Supreme Court, U. S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
AFL-CIO, ET AL.,
Petitioners,
vs.
LARRY G. HARDISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED FEBRUARY 9, 1976 AND MARCH 29, 1976
CERTIORARI GRANTED NOVEMBER 15, 1976

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Relevant Docket Entries 1

Complaint 3

Answer of International Association of Machinists and Aero Space Workers, District 142 10

Answer of International Association of Machinists and Aero Space Workers, Local 1650 13

Separate Answer of Defendant Trans World Airlines, Inc. 16

Answer of International Association of Machinists and Aero Space Workers 17

Standard Pretrial Order No. 2 21

Stipulation 56

Stipulation 60

Stipulation 63

Transcript of Proceedings—

- Testimony of Larry Glenn Hardison 65
- Deposition 98
- Testimony of Everett Herbert Kussmann 115
- Testimony of Wilbur Stone 148
- Testimony of Earl Box 165
- Testimony of Joseph Whitney Bowman 178

Memorandum and Order 183

Excerpts From Agreement Between Trans World Airlines, Inc., and the Mechanics and Related Employees in the Service of Trans World Airlines, Inc., As Represented by International Association of Machinists and Aerospace Workers 210

Memorandum and Order of the United States District Court for Western District of Missouri, May 15, 1974 218

Decision of Eighth Circuit, December 16, 1975 246

RELEVANT DOCKET ENTRIES

Feb. 10, 1972 Complaint—filed.

Mar. 1, 1972 Answer of International Association of Machinists and Aero Space Workers District 142—Filed.

Mar. 1, 1972 Answer of International Association of Machinists and Aero Space Workers Local 1650—Filed.

Mar. 2, 1972 Separate answer of defendant Trans World Airlines, Inc.—Filed.

Mar. 30, 1972 Answer of International Association of Machinists and Aero Space Workers—Filed.

Apr. 5, 1972 Interrogatories to plaintiff by defendant District 142 and defendant Local 1650—Filed.

Jul 12, 1972 Answers to interrogatories propounded by defendants District 142 and Local 1650—Filed by plaintiff. Submitted.

Oct. 17, 1972 Standard Pretrial Order No. 2—Filed.

Oct. 26, 1972 Stipulation of the Parties—filed

Nov. 8, 1972 Stipulation—filed.

Nov. 21, 1972 Stipulation—Filed. (Charles Riley was a non-union employee of Bendix Corporation and not covered by collective bargaining agreement.)

July 3, 1973 Suggested findings of fact by plaintiff—filed.

July 3, 1973 Suggested conclusions of law by plaintiff —filed.

July 19, 1973 Defendant Unions' response to plaintiff's suggested findings of fact and suggested conclusions

of law and defendant unions' suggested findings of fact and conclusions of law—Filed.

Jul 19, 1973 Defendant TWA's response to plaintiff's suggested findings of fact and suggested conclusions of law and defendant TWA's suggested additional findings of fact and suggested conclusions of law—Filed.

May 15, 1973 Memorandum and Order—Filed. (Title VII, 42 USC, §2000e-2(h) indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems. The Court finds that neither TWA nor any of the three (3) unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. The Clerk of the Court is hereby Ordered to enter judgment for the defendants. JWO) Copies to counsel.

May 17, 1973 Notice of Appeal—filed. Copies mailed to counsel.

December 16, 1975 Decision of United States Court of Appeals for the Eighth Circuit.

January 19, 1976 Stay of Mandate by United States Court of Appeals for the Eighth Circuit

February 9, 1976 Petition for Writ of Certiorari in No. 75-1126

March 8, 1976 Order Extending time to file Petition for Writ of Certiorari (No. A-763)

March 29, 1976 Petition for Writ of Certiorari in No. 75-1385

November 15, 1976 Order of Supreme Court Granting Certiorari

COMPLAINT

(Filed February 10, 1972)

COMES NOW plaintiff and for his Cause states:

1. That plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this Judicial District; that defendant, Trans World Airlines, Inc., is a corporation authorized to do business in Missouri, with a principal office located in this Judicial District, and defendant, Trans World Airlines, Inc., being an "employer" as defined in Title 42 U.S.C., Section 2000e; that defendant, International Association of Machinists and Aero Space Workers, and District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers are unincorporated labor organizations having officers and agents for management of said labor organizations representation of their member employees in this Judicial District.

2. Jurisdiction of this Court is invoked pursuant to Section 706 of the Civil Rights Act of 1964, Titled 42 U.S.C. 2000e-5(e). Jurisdiction of this Court is further invoked pursuant to 28 U.S.C. 1343.

3. This is a proceeding for a permanent injunction restraining defendant, Trans World Airlines, Inc. from maintaining a policy, practice, custom and usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive, or discharge or attempting to discharge or otherwise interfering with the employment of the plaintiff on the ground of his religion. This is further a proceeding for a permanent injunction restraining all defendant labor organizations from the same activity as aforesaid regarding defendant Trans World Airlines, Inc., and further to enjoin them from engaging in unlawful employment practice for a labor organization by

discriminating against plaintiff because of his religion, by failing to discharge their duty towards the plaintiff as a member of their labor organization because of his religion, and by acting in such a manner as to deprive or tend to deprive the plaintiff of an employment opportunity with defendant Trans World Airlines, Inc., and any and all activity that would otherwise adversely affect his status as an employee of Trans World Airlines, Inc. Further, this is also a proceeding for other equitable relief as the Court may deem proper and for legal relief to be afforded the plaintiff due to the religious discrimination of all defendants herein.

4. That plaintiff is a member of a religion which observes the Sabbath from Friday at sunset until Saturday at sunset.

5. That plaintiff was employed by defendant Trans World Airlines, Inc. from June 5, 1967 until he was discharged by defendant Trans World Airlines, Inc. on April 2, 1969; that plaintiff informed defendant Trans World Airlines, Inc. of his religious beliefs on or before October 11, 1968, after accepting said beliefs on or about September, 1968; that subsequent to March, 1969, defendant Trans World Airlines, Inc., discriminated against plaintiff by reason of his religion and discharged plaintiff on April 2, 1969. Said conduct on the part of defendant Trans World Airlines, Inc. all being in violation of Title 42 U.S.C. Section 2000e-2.

6. Defendant International Association of Machinists and Aero Space Workers, and defendants District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers, discriminated against plaintiff because of his religious beliefs in failing to negotiate, assist, or correct the discriminatory policies of defendant Trans World Airlines, Inc. The said labor organizations cooperated, acted in concert, and assisted defendant Trans World Airlines, Inc. in their discharge of the plaintiff. The said conduct on the part of all defendants herein being in violation of Title 42 U.S.C. Section 2000e-2.

7. On or about October 28, 1969, the Equal Employment Opportunity Commission (E.E.O.C.) assumed jurisdiction of plaintiff's timely and proper complaint (Exhibit A) which alleged denial by all defendants herein of plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, et seq. That plaintiff filed his administrative charge with the E.E.O.C. within 210 days after the unlawful employment practice by all defendants occurred, and that plaintiff requested a "Notice of Right to Sue Letter" which was mailed to him on January 11, 1972. This civil action in this Court is now being brought against all defendants herein, all of said procedures being in compliance with Title 42 U.S.C. 2000e et seq.

8. By reason of the aforesaid religious discrimination against the plaintiff in violation of the applicable statutes, by all defendants herein, plaintiff has suffered a loss of wages and benefits in the amount paid by the defendant Trans World Airlines, Inc., to said such employees for such position as occupied by that of the plaintiff, and plaintiff has been damaged in an amount to be determined by this Court.

WHEREFORE, plaintiff respectfully prays this Court:
1. That a permanent injunction issue enjoining defendant, Trans World Airlines, Inc., its agents, successors, employees, attorneys, and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with

the right of plaintiff to be employed by defendant Trans World Airlines, Inc. on the basis of merit rather than that of religion, and the right to equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

2. That a permanent injunction issue enjoining all defendant labor organizations, International Association of Machinists and Aero Space Workers, and District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers, and their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing or maintaining the policy, practice, custom and usage of failing to adequately represent, denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the right of plaintiff, including cooperation and assisting defendant Trans World Airlines, Inc. or any other employer in discriminating against the plaintiff, by reason of the fact that plaintiff believes in certain religious beliefs, and further that all labor organizations be enjoined from depriving plaintiff of the right to equal membership opportunities and equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

3. Award plaintiff all loss in wages and lost benefits which he suffered as a result of his discriminatory discharge from defendant Trans World Airlines, Inc., and prays that the Court order such affirmative relief and action as may be appropriate and the Court may deem proper.

4. Allow plaintiff his costs herein including reasonable attorney's fees and other additional relief as may appear to the Court equitable and just.

Exhibit A

...as soon as possible. It must be mailed within 30 days after the discriminatory act took place. (See addresses on back page)

...on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TLC00061

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss, indicate) XXXXXX Larry Glenn Hardison — Phone Number 483-6263
Street Address 5017 Thompson--Apt. 3
City Kansas City — State Missouri — Zip Code 64124

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☐ Religious Creed ☒ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprentice committee. If more than one, list all.
Name Trans World Airlines
Street Address Kansas City International Airport
City Kansas City — State Missouri — Zip Code 64100
AND (other parties if any) International Association of Machinists and Aero Space Workers
Vivion Road & Cliffview Drive
Riverside, Missouri

4 Have you filed this charge with a state or local government agency? Yes ☐ When ___ (Month, Day, Year) No

5 If your charge is against a company or a union, how many employees or members? Over 25 ☐ Over 50 ☒

6 The most recent date on which this discrimination took place Month April Day 2 Year 1969

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary)
On June 5, 1967 I was hired by T.W.A. as a stores clerk. About September 1968 I accepted a religous faith which observes Friday sunset to Saturday sunset as the Christian Sabbath. I immediately approached the company with this information. I contacted not only my immediate supervisor but also Mr. Everett Kussman, Supervisor System Stores, about my religous convictions.
Prior to October 1968 I was able to schedule, through seniority preference, my ... week so that I'd be able to observe the Sabbath. On October 4th I wrote Mr. Kussman a letter advising him of my new schedule, and that I would provide him a list of annual days that I would require off for religous purposes which we discussed at our previous meetings. (PLEASE SEE ENCLOSURE # 1)
During the time between October '68 and March '69 I had transfered to a different (still in Stores), and in the engine overhaul building. During the month of February vacation were scheduled. The man with lowest seniority scheduled his vacation for ... 3rd thru March 14th. When his vacation came due Mr. K. Kussman called me to his office ... (CONTINUED ON SEPARATE SHEET)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
(Signature)
Subscribed and sworn to before me this ... day of ... 196...
(Notary)
You should contact a Notary Public ... when you want to sign this form. ... will be

EXHIBIT "A"

BEST COPY AVAILABLE

(As I would be required to work in his place. This man had Tuesday and Wednesday off and worked weekends,) Mr. Kussman and I discussed how to avoid my being required to work on the Sabbath, not whether I would or not as he already knew I was a Sabbath observer. A trade of shifts was mentioned but the union would not allow that, a change of sections was also brought up but again the union would not allow the company to transfer me. When the company was willing to avoid the Sabbath problem the union would not allow any reasonable solution therefore forcing the company into a postion which they wished to avoid. Therefore the union became discriminatory in not allowing the company to make arraingements for my Sabbath observance, nor did they at any time offer solutions to the problem , but coveted and protected their seniority system to the point of violating the law, and constituional rights we all hold dear.

On March the 8th I was scheduled to work. March the 6th I asked my supervisor for that day off, I was refused. The morning of March 8th I called in and told the duty storekeeper that I would not be in that day. Neither my regular supervisor nor the duty storekeeper had been informed by higher management that I was a Sabbath observer therefore compounding the problem.

On the 15th I was again scheduled to work to cover for vacation. At that time Mr. Richard Stewart had taken over Mr. Nicholson's position while he was on vacation. On approximately the 14th I had a discussion with Mr. Stewart, and requested the 15th off, I was refused. He instructed me that I would be considered insubordinate if I did not show up on the 15th. I asked him who he would I rather insubordinate T.W.A. or God, he gave me no answer. He then asked me if I would be in, I told him no I wouldn't. On the morning of the 15th I tried to call but no one answered. Admittedly I should have made a later call but I didn't, even though I had told Mr. Stewart I wouldn't be in.

On March 21st I was called into Mr. Butcher's office and told that if I did not work on the 22nd a discharge hearing would be held because of my insubordination. At that time I informed him of my religous convictions and that there could be no exceptions. He offered no solutions nor suggestions, nor did my union steward who also was in attendance nor did he charge that this would be religous discrimination if carried through. They (the company) did not condider religous beliefs an acceptable justification for absence. (PLEASE SEE ENCLOSURE # 2)

On March 22nd I was again scheduled to work, and on that morning I called in and informed the duty storekeeper that I would not be in.

On March the 25th I received a letter from Mr. Butcher charging me with insubordination and informing me of the date of my discharge hearing. (PLEASE SEE ENCLOSURE # 3)

On March the 31st the discharge hearing was held. My hearing officer was J.H.Frey, Mr. R. Shields of Industrial Relations was in attendance, as was the union greivance committee. The union did not defend my postion at the hearing. The only defence they made was to contest that discharge was too severe a penalty. No one brought up the fact that if I was found guilty and discharged, they (both the company and the union) would be violating the Civil Rights Law of 1964, and their contract with the government for their Cape Kennedy operations, and the many other federal and state laws on religous freedoms. At that time I did not know what would be violated if I was discharged, nor any time was I called on for testimony.

On April 2nd I was found guilty and discharged at the end of my shift. (PLEASE SEE ENCLOSURE # 4)

Approximately the 10th of April I called Industrial Relations for a letter of reference which I received. You will please note that it states I was let go ONLY because I would not work on certain days. The only days I will not work are those religous days observed by my faith. (PLEASE SEE ENCLOSURE # 5)

On August 19th I scheduled an appointment with Mr. R. Shields of T.W.A. Industrial Relations. We discussed the problem and I informed him that the discharge was illegal and discriminatory and requested rehire. He denied discrimination and refused to rehire me, therefore compounding and continuing their unfair and illegal actions.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, DISTRICT 142

(Filed March 1, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, District 142 ("District 142") states

FIRST DEFENSE

1. Defendant District 142 admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant District 142 admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant District 142 admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C., Section 2000e; Defendant District 142 admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant District 142 admits that International Association of Machinists and Aero Space Workers, Local 1650 ("Local 1650") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant District 142 admits that the International Association of Machinists and Aero Space Workers ("International") is a separate and distinct labor organization with agents in this judicial district. Defendant District 142 denies each and every other allegation contained in Paragraph 1 of the Complaint.

2. Defendant District 142 admits that Plaintiff purports to bring this action pursuant to Section 706 of the

Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and 28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

3. Defendant District 142 states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

4. Defendant District 142 has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

5. Defendant District 142 admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

6. Defendant District 142 denies each and every allegation contained in Paragraph 6 of the Complaint.

7. Defendant District 142 states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against "International Association of Machinists and Aero Space Workers"; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969, which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969 with the Equal Employment Opportunity Commission. Defendant District 142 denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

8. Defendant District 142 denies each and every allegation contained in Paragraph 8 of the Complaint.

SECOND DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

10. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate with Defendant District 142 in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant District 142.

FIFTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant District 142 prays that the Court (1) award Defendant District 142 its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (2) allow Defendant District 142 to be discharged with its costs.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, LOCAL 1650

(Filed March 1, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, Local 1650 ("Local 1650") states

FIRST DEFENSE

1. Defendant Local 1650 admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant Local 1650 admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant Local 1650 admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C, Section 2000e; Defendant Local 1650 admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant Local 1650 admits that International Association of Machinists and Aero Space Workers, District 142 ("District 142") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant Local 1650 admits that the International Association of Machinists and Aero Space Workers ("International") is a separate and distinct labor organization with agents in this judicial district. Defendant Local 1650 denies each and every other allegation contained in Paragraph 1 of the Complaint.

2. Defendant Local 1650 admits that Plaintiff purports to bring this action pursuant to Section 706 of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and

28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

3. Defendant Local 1650 states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

4. Defendant Local 1650 has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

5. Defendant Local 1650 admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

6. Defendant Local 1650 denies each and every allegation contained in Paragraph 6 of the Complaint.

7. Defendant Local 1650 states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against International Association of Machinists and Aero Space Workers; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969 which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969, with the Equal Employment Opportunity Commission. Defendant Local 1650 denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

8. Defendant Local 1650 denies each and every allegation contained in Paragraph 8 of the Complaint.

SECOND DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted against Defendant Local 1650.

THIRD DEFENSE

10. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant Local 1650.

FIFTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant Local 1650 prays that the Court (1) award Defendant Local 1650 its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (2) allow Defendant Local 1650 to be discharged with its costs.

SEPARATE ANSWER OF DEFENDANT TRANS WORLD AIRLINES, INC.

(Filed March 2, 1972)

Comes now defendant Trans World Airlines, Inc. and for its answer to plaintiff's complaint, alleges and states as follows:

First Defense

1. Plaintiff's complaint fails to state a claim against Trans World Airlines, Inc. upon which relief can be granted.

Second Defense

2. It admits the allegations contained in paragraph 1 of plaintiff's complaint.

3. It denies each and every allegation contained in paragraphs 2 and 3 of plaintiff's complaint.

4. It states that this defendant is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 4 of plaintiff's complaint.

5. It denies each and every allegation contained in paragraph 5 of plaintiff's complaint, except it admits that plaintiff was employed by this defendant from June 5, 1967 until he was discharged on April 2, 1969.

6. It denies each and every allegation contained in paragraph 6 of plaintiff's complaint.

7. It denies each and every allegation contained in paragraph 7 of plaintiff's complaint, except it admits that the Equal Employment Opportunity Commission received an administrative charge from the plaintiff and that plaintiff requested a "Notice of Right to Sue Letter" which was mailed to him by the E.E.O.C. January 11, 1972.

8. It denies each and every allegation contained in paragraph 8 of plaintiff's complaint.

Third Defense

9. This court lacks jurisdiction over the subject matter of plaintiff's complaint for the reason that plaintiff failed to comply with the procedures required by Title 42 U.S.C. §2000e et seq.

Fourth Defense

10. Plaintiff failed to exhaust his administrative remedy under the collective bargaining agreement between TWA and the International Association of Machinists and Aero Space Workers as required by the Railway Labor Act (45 U.S.C. §151 et seq. §181 et seq.).

WHEREFORE, having fully answered plaintiff's complaint, defendant Trans World Airlines, Inc. prays that said complaint be dismissed and for its costs herein incurred and expended.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS

(Filed March 30, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, states that its true and correct name is "The Grand Lodge of the International Association of Machinists and Aerospace Workers" (hereinafter the International) and for its answer states

FIRST DEFENSE

1. Defendant International states that it has not been properly served with process pursuant to F.R.C.P. 4 in that the Court lacks jurisdiction over its person under F.R.C.P. 12(b)(2) since there has been insufficient service of process under F.R.C.P. 12(b)(5).

SECOND DEFENSE

2. Defendant International admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant International admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant International admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C., Section 2000e; Defendant International admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant International admits that International Association of Machinists and Aero Space Workers, District 142 ("District 142") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant International admits that the International Association of Machinists and Aero Space Workers Local 1650 ("Local 1650") is a separate and distinct labor organization with agents in this judicial district. Defendant International denies each and every other allegation contained in Paragraph 1 of the Complaint.

3. Defendant International admits that Plaintiff purports to bring this action pursuant to Section 706 of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and

28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

4. Defendant International states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

5. Defendant International has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

6. Defendant International admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

7. Defendant International denies each and every allegation contained in Paragraph 6 of the Complaint.

8. Defendant International states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against International Association of Machinists and Aero Space Workers; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969 which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969, with the Equal Employment Opportunity Commission. Defendant International denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

9. Defendant International denies each and every allegation contained in Paragraph 8 of the Complaint.

THIRD DEFENSE

10. The Complaint fails to state a claim upon which relief can be granted against Defendant International.

FOURTH DEFENSE

11. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FIFTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant International.

SIXTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant International prays that the Court (1) dismiss the case against the International or in lieu thereof quash service against it for the reasons stated in Defendant International's First Defense and/or (2) award Defendant International its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (3) allow Defendant International to be discharged with its costs.

STANDARD PRETRIAL ORDER NO. 2

(Filed October 17, 1972)

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 20 of this Court,

IT IS ORDERED:

I. *This as an action for:* This is an action by an individual Plaintiff against his former employer, Trans World Airlines ("TWA") and three labor organizations ("Local 1650", "District 142", and "The International") seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964, as set forth in Plaintiff's Complaint filed February 10, 1972. All such discrimination has been denied by each and every Defendant in separate answers which also raised certain affirmative defenses.

II. *Federal Jurisdiction is Involved Upon the Ground:*

Plaintiff is a resident of Missouri and was a resident of this federal district at all material times, and the unlawful employment practice is alleged to have been committed at the TWA overhaul base, located within this judicial district. Defendant TWA is an employer engaged in interstate commerce and subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) ("Title VII"). Defendant Local 1650, Defendant District 142 and Defendant International is each a labor organization subject to the provisions of Title VII. Federal jurisdiction is sought on the basis of 42 U.S.C. 2000(e)(5)(f). Defendant International denies the Court's jurisdiction over it since it alleges it has not properly been served with process. All Defendants deny the Court's jurisdiction because they

allege Plaintiff has failed to follow procedural requirements established under Title VII, the Railroad Labor Act, contractual grievance machinery and internal union remedies, any one of which Defendants allege is a prerequisite to conferring the Court with jurisdiction in this case.

III. *The Following Facts are Admitted and Require No Proof*:

1. Plaintiff was employed by Defendant TWA on June 5, 1967 and terminated by TWA on April 2, 1969.

2. Plaintiff was a member of the International Association of Machinists and Aero-Space Workers, AFL-CIO and was employed at a geographic point where the TWA-IAM agreement was administered on a local level by Local 1650 and on a district level by District 142.

3. Plaintiff was a member of a religion which observes the Sabbath from Friday at sunset until Saturday at sunset at the time of his discharge by Defendant TWA on April 2, 1969.

4. Prior to Plaintiff's discharge by Defendant TWA, Plaintiff had informed Defendant TWA of his religious beliefs.

5. That during the period of time that Plaintiff was employed by Defendant TWA, his employment relationship with Defendant TWA was governed by a collective bargaining agreement between Defendant TWA and International Association of Machinists and Aero-Space Workers covering all mechanics and related employees, which was signed August 25, 1966. At the time Plaintiff was employed by TWA, the TWA-IAM agreement applied to and covered about fifteen thousand employees located at more than thirty-one geographic locations through the United States.

6. Trans World Airlines, Inc. is a common carrier engaged in the interstate transportation of passengers, cargo and mail pursuant to operating authority granted by the Civil Aeronautics Board. This authorization requires the rendition of a safe, efficient and adequate service in the public interest and Trans World Airlines, Inc. meets its obligation to perform this service by conducting operations on a seven day a week basis. For this purpose Trans World Airlines, Inc. employs approximately thirty-seven thousand employees at approximately one hundred locations.

A seven day a week operation depends upon support from a number of departments within Trans World Airlines, Inc., including the Stores Department at the overhaul base at Kansas City International Airport, Kansas City, Missouri. The work at the Stores Department includes the delivering of parts and materials to mechanics at the overhaul base for the purpose of repairing, maintaining and overhauling aircraft and engines. In addition to work on TWA's own fleet, TWA performs repair, maintenance and overhaul at said overhaul base for approximately thirty other airlines. All these activities require seven day a week support from the Stores Department at the overhaul base at Kansas City International Airport, Kansas City, Missouri.

7. Plaintiff was initially employed by Defendant TWA as a Stores Clerk in Building No. 1 at the Kansas City Overhaul Base.

8. On or about December 2, 1968 Plaintiff voluntarily bid to another stores clerk section in Building No. 2 at the overhaul base at Kansas City International Airport, Kansas City, Missouri. Building No. 1 Stores Stockroom Section and Building No. 2 Stores Progress Section are

two separate seniority groupings, and by bidding to the Building No. 2 section Plaintiff had less relative seniority within his new seniority grouping than he had previously had in the Building No. section. Within the Building No. 2 section Plaintiff became the second lowest man in order of seniority on the day shift, the man with the lowest seniority on that shift being an employee named Bill Wyatt. Plaintiff's title as Stores Clerk, his wages, benefits and duties remained the same.

In March, 1969 Bill Wyatt went on vacation. Normally when a weekend vacancy in a job in a Stores section is created by a vacation schedule, TWA management advises the IAM steward in that section of the vacancy. The application of the seniority provisions of the TWA/IAM agreement within that section would have resulted in Plaintiff being scheduled to work March 8, 1969 which fell on a Saturday. Wyatt's job entailed delivering parts and materials to mechanics in Building No. 2 for the repair and maintenance of aircraft engines. Wyatt had Tuesdays and Wednesdays off and worked weekends.

9. TWA Overhaul Base works on a twenty-four hour basis, with three shifts a day. The Store Department, where Plaintiff was employed, was open all year around, twenty-four hours a day.

10. When Plaintiff was employed at TWA, he received the contract between the Machinists and TWA. He also received a copy of the International Constitution, a copy of Local 1650's By-Laws, a copy of District 142's By-Laws, and he read them.

11. The Union was certified by the National Mediation Board on November 20, 1945, May 15, 1946 and September 3, 1949, in accordance with the provisions of Title II of the Railway Labor Act.

12. On Hardison's employment application dated February 27, 1967, the following question was asked and answered:

Q. "Are you willing to work shifts, including weekend?"

A. "Yes."

13. A member of the Worldwide Church of God officially becomes a member upon baptism, but the obligations for members are not different than for non-members who are studying to become members.

14. The Worldwide Church of God celebrates holidays known as:

(1) The First Day of Unleavened Bread;

(2) Last Day of Unleavened Bread;

(3) Pentecost;

(4) Feast of Trumpet;

(5) Day of Atonement;

(6) Feast of Tabernacles;

(7) Last Great Day.

All the holidays occur at different dates in reference to the Gregorian calendar. Those who practice the religion are not to work on these holidays.

15. The International Association of Machinists and Aero-Space Workers AFL-CIO is an international labor organization with over one million members in a large number of industries and geographic locations, both in the United States and foreign countries. It maintains its principal office in the Machinists Building, 1300 Connecticut Avenue, N.W., Washington, D. C. It has agents located within the State of Missouri and within this judicial dis-

trict, designated Grand Lodge Representatives. The officers of the International are elected by a vote of the entire Machinists' membership of approximately one and one-half million members. The International maintains its own treasury, hires and fires employees to work for it, and files reports in its name with the United States Government and other local and state governments.

16. District 142, International Association of Machinists and Aero-Space Workers, is a delegate body made up of representatives from approximately thirty-one locals located throughout the United States and is responsible for the representation, nationwide, of all employees in certain classifications employed by TWA and Ozark Airlines. In April 1969, there were approximately fifteen thousand TWA employees under District 142's jurisdiction at the time of Plaintiff's employment by TWA. District 142 at all material times has maintained its business offices at 206 Northeast 32nd Avenue, Kansas City, Missouri. The agent of 142 assigned to the Overhaul Base during the time this grievance arose was Joseph W. Bowman, Sr., Assistant General Chairman. The District officers are elected by employees whom they represent at TWA and Ozark Airlines. The District maintains its own offices and treasury, hires and fires its employees and files reports with the United States and other local and state governments.

17. Local 1650 represents and consists of employees employed by TWA and Ozark Airlines located at Kansas City, Missouri; Wichita, Kansas; and Louisville, Kentucky. There are more than five thousand employees who belong to Local 1650 at these locations, most of whom are employed by TWA in the Kansas City area. For about nine years Local 1650 has maintained its business office and main meeting hall at Vivion Road and Cliffview Drive

in Riverside, Missouri. Local 1650 elects its own officers, maintains a treasury in its own name, makes expenditures in its own name, files required reports in its own name with United States Government and other governmental agencies, hires and fires employees to work for it, conducts its own meetings, and runs its day-to-day affairs. The Local can take no action contrary to the International Constitution or District By-Laws, but in all other ways it runs its own affairs and makes its own decisions independently. The International, District and Local are each separate labor organizations and separate legal entities.

18. Stewards of Local 1650 are elected by members of 1650. They receive no pay from Local 1650, no pay from the District and no pay from the International for their duties as stewards. Stewards do receive reimbursement of their union dues from Local 1650 if they serve as stewards and attend one Local meeting per month and one steward meeting per month. At all material times, James Tinder and Earl Box were stewards or committeemen and agents of Local 1650.

19. Service was made on Local 1650 on February 11, 1972 at its offices at Vivion Road and Cliffview Drive, Riverside, Missouri. Service upon District 142 was made on February 22, 1972 at its office in Kansas City, Missouri. Purported service on the International was made on March 8, 1972 by serving a copy of the Complaint on James Tarwater, Vivion Road and Cliffview Drive, Riverside, Missouri, the address of Local 1650. James Tarwater is Financial Secretary of Local 1650.

20. On April 25, 1968, Plaintiff wrote the following note to Everett Kussmann, Manager of Store Systems:

> Would like to see you about a change in weekly days off. I wish to request either Friday and Saturday

off or from Friday sunset to Saturday sunset off with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is I sincerely believe this is the Sabbath and no servile work may be done then.

On April 27, 1968, Kussman wrote a note concerning Plaintiff's April 25, 1968 memo:

> Arrange for Mr. Hardison and his steward to see me S.A.P.

On May 3, 1968, Kussman wrote a memo to Burns Prater, a supervisor, as follows:

1. Agreed to steward seeking swap or days off.
2. Agreed to odd holidays (excused T.O.) if he works the Christian holiday when requested.
3. He advises you are getting him another job—agreed you should. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong, Ambassador College, Pasadena, California.

On May 7, 1968, Prater wrote Kussman

> I haven't made any headway. His time off and day off requirement are too difficult to handle. I understand that no one would swap days off with him.

In the last part of September 1968, Plaintiff requested and received a conference with Kussman. James Tinder was also present.

21. By letter dated October 4, 1968 and received October 7, 1968, Plaintiff wrote to Kussman:

10-4-68

Attn: Mr. E. Kussman

Subj: Days Off

From: L. G. Hardison

Sir;

As per our conversation several months ago concerning certain religious days (annual), that I would be required to be off. You said that you would excuse me from work those days, when I could have the Sabbath off and be accepted into the church.

This is to inform you that I have finally transferred to 11-7 shift and now can observe the Sabbath. My enterance into the church will soon follow. I will, if you so wish, furnish you (or your designate), a list of those dates that I would need per year, beginning with the new year.

I would appreciate a reply, with any comments you wish to make.

Thank you for your sincere and understanding consideration and cooperation.

On October 11, 1969, Kussman wrote Plaintiff the following letter which verified the contents of the earlier meeting.

> I acknowledge with interest your letter of October 4 regarding our previous discussion relating to the requirement of your religious belief, particularly with relationship to holidays, both those provided by the contract and those observed by your religious convictions. In our previous discussion, I indicated a willingness to consider your specific holiday requirements for time off when possible and you in turn indicated

your willingness to volunteer for all contract provided holidays making yourself available for work. You recognized that I may not always be able to comply for reasons that may be beyond my control and I in turn recognized that you could only make yourself available for contract provided holidays, but that you may not be scheduled because of the union method of scheduling in turn.

I would appreciate, at your earliest convenience, a list of holidays that you refer to in your letter. I in turn will respond with a list. I am pleased that your shift change permits you to observe the sabbath. I wish you every success and happiness in your relationship with the church. You are probably aware that the company's response to your request has been assisted by your fine attitude.

On October 20, 1968, Hardison wrote to "Manager, System Stores":

The following is the previously discussed list of religious holidays that I must observe for 1969.

APRIL 3	SEPT 27	
APRIL 9	OCT 4	(SEE NOTE)
MAY 26		
SEPT 13		

NOTE: Sept. 27th, begins the Festival of Tabernacles which is a week long commanded assembly, ending Oct. 3rd. October 4th is The Last Great Day on which I can do no work. But it happens to fall on one of my regular days off this year. I shall schedule my vacation for the coming years to include these days so that I will be able to comply with their observance.

I would like to thank you again for your sincere understanding and cooperation in this manner. You have certainly brightened my outlook and future.

22. In March 1969, Plaintiff requested from his supervisor to leave early on a Friday evening so that he could conform with the Sabbath. Fox told Plaintiff that he could not say yes or no, but to use his own judgment. Plaintiff subsequently punched out and went home. He received no reprimand from the Company for so doing.

23. Plaintiff was absent on the following days when he was scheduled to work for TWA: March 8, March 15 and March 22, 1969.

24. A few days prior to March 8, 1969, Plaintiff had two separate conversations concerning his desire to be excused from work on March 8, 1969, (1) with Everett Kussman, Manager, Stores Systems and James Tinder, Local 1650 steward; and (2) with his immediate foreman, Nicholson, alone.

The first meeting was on March 6, 1969, and was initiated by Kussman on March 6, 1969, with Plaintiff and his Union steward, Tinder to discuss Plaintiff's religious needs after Kussman saw that Plaintiff was scheduled to work on Saturday, March 8, 1969 due to vacation schedules. Following the March 6, 1969 meeting, Plaintiff was still scheduled to work on March 8, 1969.

25. On March 8 Plaintiff was absent from work. He called in to the Day Storekeeper and told him he would like to have the day off for personal business and that he would not be in. The Day Storekeeper asked if the Plaintiff had talked to his immediate supervisor. Plaintiff said that he had, but that his immediate supervisor would not allow the day off. The Day Storekeeper then said that he could not allow the day off either. Plaintiff did

not inform the Day Storekeeper that he was being off to observe what he considered to be the Sabbath.

26. A few days prior to March 15, Plaintiff had a conversation with his substitute foreman, Stewart (a substitute for Nicholson), and asked to be excused for March 15, 1969. Stewart refused to excuse Plaintiff for March 15, 1969. No one but Stewart and Plaintiff were present during this conversation.

27. On March 15, Plaintiff was absent from work. Plaintiff tried one time to report his absence by telephone and claims that he could not reach anyone at the Company.

28. On about March 21, Plaintiff had a conversation with W. J. Butcher, Supervisor Stores Planning and Control, in the presence of James Tinder, Local 1650 Steward.

29. As a result of the March 21, 1969 meeting, Butcher wrote Plaintiff the following letter, confirming the contents of the meeting and setting forth TWA's position:

> This letter will confirm our conversation in my office on this date, in the presence of Steward Jim Tinder, regarding your failure to report for work on two consecutive Saturdays—March 8 and March 15, 1969.
>
> During this discussion, you informed me your religious tenets precluded your working at any time between sunset Friday and sunset Saturday. Additionally, you advised you had discussed this with your Minister and there is no provision that would allow you to deviate from this requirement.
>
> The following facts are also a matter of record. Prior to your change of days off from Saturday and Sunday to Wednesday and Thursday, Mr. E. H. Kussman discussed the impending weekend work with you (since he had already made some commitments on allowing

> you to take special religious holiday periods throughout the coming year), and you did not refuse to work Saturday at that time.
>
> Subsequently, on March 6, 1969 you asked your Supervisor, John Nicholson, to be off on March 8, the first Saturday scheduled to work for "personal business" reasons which you refused to clarify. Permission was refused. On the Saturday in question, March 8, 1969, you telephoned Storekeeper Bob Jones and again requested the day off for "personal business" which you again refused to clarify and again were refused. At this time, Mr. Jones asked why you hadn't obtained prior approval from your supervisor and your comments were, "you just didn't get around to it." In your discussion to me you stated your supervisor was a difficult man to talk to. In any case, you did not report.
>
> The following Friday, your Supervisor (R. C. Stewart acting for J. W. Nicholson) advised he had conversation with you directing you to report and explaining the possibility of disciplinary action.
>
> Again on Saturday, March 15, 1969, you did not report nor did the Duty Storekeeper receive a telephone call from you advising you would not be in. In our discussion, you advised a call was made but the line was busy. This fact should not have prevented a later call.
>
> As a result of the foregoing and since you are again scheduled to work Saturday, March 22, 1969, I advised you I have no alternative but to schedule a discharge hearing in your behalf should you fail to appear without an acceptable justification."

30. On March 25, 1969, Butcher wrote Plaintiff the following:

> A discharge hearing in your behalf has been scheduled for Friday, March 28, 1969 at 2:00 P.M. in the Building #2 Conference Room. Your Hearing Officer will be Mr. C. E. Bowman.
>
> You are charged with insubordination in that on Saturday, March 22, you refused to work as directed specifically by my letter of March 21, 1969 which was confirmation of a discussion held with you in the presence of your steward on that date.
>
> The reason for your refusal to work on three successive Saturdays (March 8, 15 and 22) is a matter of record.

31. On March 31, 1969, a discharge hearing was held before J. H. Frey, a designated representative of TWA, pursuant to Article XI(b)(8) of the IAM-TWA collective bargaining agreement. At the hearing, members of Local 1650 grievance committee were present and argued against Plaintiff's discharge on the grounds that TWA had committed certain procedural errors which made any discipline improper and, in any event, that the penalty of discharge was too severe to be invoked against the Plaintiff. Frey's decision was reached by Frey alone. As a result of the hearing, on April 2, 1969, Frey wrote the following to Plaintiff:

> At the discharge hearing held in your behalf on Monday, March 31, 1969, it was established that the facts in the case were not in dispute. You agreed that you refused to work as directed by your supervisor on Saturday, March 22, 1969 and the charge that you also refused to work on March 8 and March 15, 1969 was not contested.

> Further testimony revealed that you conscientiously object and refuse to work between the hour of sundown on Friday evenings to the hour of sundown on Saturday evenings and on certain religious holidays. I would not presume to censure you for abiding by the tenets of your religion, but I would point out to you that TWA as a transportation company, serving the needs of the public seven days a week, has need of employees who will work as required to fill this need.
>
> I, therefore, have no alternative but to find you guilty of insubordination as charged.
>
> Your service with TWA will be terminated effective at the end of your shift on Wednesday, April 2, 1969.

32. Pursuant to the IAM-TWA collective bargaining agreement, if a discharge is made as a result of a hearing conducted by a TWA officer, the discharge is then referred to District 142 for its review and if the District, after reviewing the facts, concludes that the discharge is improper it may refer the grievance to the System Board of Adjustment where the grievance is subject to a final and binding determination by the three man System Board of Adjustment, which includes an impartial neutral and qualified arbitrator pursuant to Article XII of the collective bargaining agreement.

On April 7, 1969, the Local 1650 Grievance Committee Chairman, Earl Box, transferred the case to District 142 Assistant General Chairman Joe Bowman, with the following letter addressed to him

Dear Joe:

This is a sad case in which we found an individual torn between loyalty to his job and loyalty to his religious beliefs. This individual indicated that he was willing to work any hours, take any combination of Days Off, and work any shift as long as he did not have to work between Sundown Friday and Sundown Saturday. Of course, we know what would happen to our TWA-IAM Agreement if we made an exception to our "40 hours a week" clause in this case.

We patiently explained the situation to Mr. Hardison and he indicated that under no circumstances could he violate his religious beliefs even to save his job. He insisted on a hearing and all we could do was plead that discharge was too severe. Mr. Hardison refused to work on three consecutive Saturdays and also punched out and went home on Friday, March 28 at 6:32 p.m.—sundown—even though his absence was not excused. Needless to say, Mr. Hardison was discharged effective Wednesday, April 2, 1969.

We will be happy to answer any questions you might have.

33. On May 1, 1969, Joseph W. Bowman, Assistant General Chairman of District 142, wrote to the Local 1650 Committee as follows:

> This will acknowledge receipt of the above discharge.
>
> After review of this case it is my opinion the Union cannot help this Brother. I tried several times to talk to this Brother about his problem, however, he chose not to talk to me so I must assume he has no interest in working at TWA.
>
> This case is now closed in our files.

34. Plaintiff alleges his unlawful employment practice occurred on or before April 2, 1969.

35. Plaintiff's charge was signed August 25, 1969, and was received by the EEOC before August 29, 1969. The charge named "Trans World Airlines" and "International Association of Machinist and Aero-Space Workers, Vivion Road and Cliffview Drive, Riverside, Missouri."

36. On August 29, 1969, Charles E. Clark, Area Director of the EEOC, wrote a letter to Plaintiff as follows:

> We have received your communication alleging unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. Under Section 706 (b) of Title VII this Commission is unable to accept jurisdiction in your case until the matter has been deferred for sixty (60) days to the Missouri Commission on Human Rights, 314 East High, P.O. Box 1129, Jefferson City, Missouri 65101.
>
> We are sending a copy of your correspondence to that state agency. Please contact them immediately to be certain that all its requirements for commencing proceedings in your case have been met.
>
> Unless the Commission hears from you to the contrary, we will automatically assert jurisdiction over your charge on the sixty-first (61st) day after receipt by the state agency of your charge. If the state should earlier terminate its proceedings, we will at that time assert jurisdiction.
>
> If you have any further questions, please do not hesitate to call upon us.

37. On August 29, Charles E. Clark wrote the following letter to Sandra Neese, Director of Investigation, Mis-

souri Commission on Human Rights which was received September 2, 1969:

> The enclosed communication has been submitted to us alleging a violation of Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(b) of the Act no charge may be filed with this Commission under Section 706(a) until the expiration of sixty (60) days after proceedings have been commenced under the fair employment practice law of your State, unless such proceedings are terminated earlier.
>
> We would appreciate being informed of the status of this matter at the expiration of 60 days, or at the time you terminate the proceedings, whichever occurs earlier.
>
> On the 61st day of receipt of this communication, or upon earlier termination by you, the Commission will automatically assume jurisdiction unless the charging party notifies us to the contrary. If both the 61st day and termination of your proceedings would fall beyond the statutory limit of 210 days, we will assume jurisdiction on the 209th day following the occurrence of the alleged violation unless the charging party notifies us to the contrary.
>
> Thank you for your kind cooperation in this matter.

38. On October 31, 1969, Charles E. Clark wrote Plaintiff as follows:

> This is in further reference to our letter of August 29, 1969. We advised you that we had to defer to the State agency for sixty (60) days, and that we would assume jurisdiction on the sixty-first (61) day after receipt by the State agency if you had not advised us to the contrary.

> Since we have not heard from you to the contrary we assume you wish this Commission to proceed with our investigation.
>
> May we ask you to indicate the correct spelling of your name, current address, and to furnish a telephone number where you can be reached. This information will assist us in proceeding with your case. A copy of this letter is attached, with blanks for this information. We are also enclosing a self-addressed, postage paid envelope for your convenience.

Thank you for your very kind cooperation in this matter.

39. On November 4, 1969, Plaintiff wrote the EEOC as follows:

> Upon receipt of your letter dated October 31, 1969 I telephoned your office and spoke with Mr. Villarreal. I requested your office defer assumption of the case until after November 18 due to a meeting scheduled between the state investigator, Mr. Lee Henson, and the company involved.
>
> I wish to ask for your deferment of the assumption until after Mr. Henson talks with the company on the above date, or until you are notified otherwise.
>
> Thank you for your concern and continuing cooperation in this matter.

40. On November 18, 1969, Plaintiff wrote the EEOC a letter received on November 19, 1969, as follows:

> This is to give you formal notice that you may now proceed to assume the above referenced case from the Missouri Commission on Human Rights.

I wish to thank you for your lasting interest and consideration you have so well expressed. I remain . . .".

41. On February 27, 1970, the Missouri Commission on Human Rights wrote Plaintiff as follows:

> The Missouri Commission on Human Rights has acted to dismiss your complaint against the above captioned company and union for lack of jurisdiction. In your case this means that your complaints were not filed within 90 days of the alleged act of discrimination.
>
> As a matter of standard practice I wish to advise you that you may request reconsideration of the Commission's decision within thirty days after this notification by addressing a letter to Mr. Richard J. Chamier, Chairman, Missouri Commission on Human Rights, P.O. Box 1129, Jefferson City, Missouri 65101. This letter should state the reasons for your request for reconsideration, if you decide to request such, as well as any additional information or evidence which you believe is relevant.
>
> If we can be of any assistance to you in the future, please do not hesitate to contact us.

41(a). The EEOC's record entitled "Kansas City Area Office Charge Information Sheet" recites in two separate places "filing date—11/3/69."

42. Plaintiff never filed a grievance concerning his discharge or concerning the Company's refusal to allow him to be absent on Saturdays, or concerning any other matter relating to his employment at TWA.

43. When Plaintiff was discharged at TWA on April 2, 1969, he was making $3.37 per hour.

Plaintiff has worked at Kenworth Motor Truck Company since October 1969. Between October 1969 and February 1970, Plaintiff made $475.00 per month. From February 1970 to February 1971, Plaintiff made $520.00 per month. From February 1971 to February 1972, Plaintiff made $590.00 per month. After February 1972, Plaintiff made $660.00 per month.

From July 1969 until October 1969, Plaintiff worked at Beal, Inc., 4001 Kaw Drive, Kansas City, Kansas, as an inventory control clerk at $100.00 per week. From May 1969 until July 1969, Plaintiff worked at Black, Sivalls and Bryson for $390.00 per month gross.

Since his discharge from TWA, Plaintiff has also worked part-time as a store clerk for 7-11 Stores for about a three-month period at $1.60 per hour. Plaintiff's earnings were as follows for the years indicated:

1) 1968—
2) 1969—$5,259.00
3) 1970—$6,855.00
4) 1971—$7,183.00

44. No Defendant made any statements insulting or expressing animus against Plaintiff's religious beliefs.

45. The TWA-IAM collective bargaining agreement was negotiated by the Defendants before the Plaintiff began employment at TWA and with no discussion of religion and without any intent to discriminate against any religion.

46. The TWA-IAM collective bargaining agreement was completely silent concerning matters related to Plaintiff's religion in particular or any religion in general.

47. At no time during any of the Plaintiff's contacts with the Union, including at the discharge hearing on March 31, did the Union tell or indicate to the Company that it should discharge the Plaintiff. And at no time did the Union agree with the Company that the Plaintiff should be discharged.

48. The Union had no objection to the Company allowing the Plaintiff an excuse for his religious holidays which were granted by Kussman in September 1968.

49. The International was never notified of the Plaintiff's alleged religious beliefs or of the discharge for religious beliefs.

50. The Plaintiff never attempted to exercise his rights internally within the Union structure to have his grievance processed or to have any alleged wrongs corrected.

IV. *The Reservations to the Facts Recited in Paragraph III Above are as Follows*: Each Defendant denies responsibility for the acts of any individuals except their agents. Accordingly, each Defendant reserves the right to object to the acts of any individual, other than its agent, as irrelevant, immaterial and not probative of any wrongdoing by that Defendant.

V. *The Following Facts, Though not Admitted, are not to be Contested at the Final by Evidence to the Contrary*: None.

VI. *The Following Issues of Fact, and No Others, Remain to be litigated Upon the Trial*: Whether the following facts are true:

1. When did Plaintiff begin to follow his religion. When did he first mention it to the Company. Did Plaintiff work some Saturdays and also some religious holidays after beginning to follow his religion.

2. Did Plaintiff transfer to a new seniority grouping that provided him less relative seniority at a time when he knew, or should have known, that he would have less ability to utilize his seniority to bump into an acceptable day off. Could Plaintiff have avoided his problems and have protected his right to be off on his Sabbath by not transferring into the lower job seniority grouping.

3. Whether the Local District and International Union at no time whatsoever complained to the Company of the Plaintiff's conduct or take any other action designed to penalize the Plaintiff or to charge him with insubordination or any other offense.

4. What were the positions of the Plaintiff and Defendants at the various meetings that each attended.

5. If Plaintiff was allowed to select a job or bid a job or bump a job out of seniority, would it mean that another individual with more seniority who also bid on the same job but who did not share Plaintiff's religious beliefs would be deprived of the job as was the more senior employee's entitlement under the collective bargaining agreement.

6. In replacing Wyatt, did Plaintiff become the only employee available on weekends to perform the required duties performed by Wyatt.

7. Whether Plaintiff's absence from his job on Saturdays would have a disruptive effect on the work schedule on Building No. 2 of the overhaul base.

8. Whether Plaintiff's absence from his job on Saturday would lead to personnel problems or grievances from other employees.

9. Whether permitting all employees upon their request to be absent for religious observances would have a disruptive effect on TWA's business.

10. Whether due to the size of TWA's work force and the nature of its operation, to allow Hardison to be absent after giving alleged false excuse and without prior Company approval would create chaotic personnel problems and create an undue hardship upon TWA and the Unions in administering a workable system regulating the employment relationship.

11. Whether decisions of the System Board of Adjustment appointed pursuant to the grievance procedure under the requirements set forth in the Railway Labor Act are binding and final upon TWA and the Unions and establish that employees must obey management directives and grieve disputes with management rather than resort to self-help or they are guilty of insubordination which, if allowed to exist, would cause industrial chaos.

12. What happened when Plaintiff had a conversation with his immediate supervisor, Nicholson, approximately on March 6 and requested to be excused on March 8.

13. When the charging party was absent on March 8 and 15 what he told the Company about the reason for his absence.

14. Whether both before and after the March 31, 1969, Company-conducted discharge hearing, the Plaintiff was informed by the Local Union Committee and others that an unfavorable decision in the hearing would be sent to the District for its consideration and that he should contact Joseph Bowman at the District to discuss the matter so that Bowman would have sufficient knowledge to base a decision on whether the matter should be appealed to the System Board of Adjustment.

15. Whether after Plaintiff's discharge, his discharge case was referred to District 142 and thereafter, the agent responsible for processing the grievance for District 142, Joe Bowman, attempted to set up a meeting with Hardison promised to meet with Bowman, but failed to keep his appointment and never contacted or cooperated in the processing of the grievance at the District level and thereby caused the matter to be dropped by the District.

16. Whether Plaintiff took steps necessary to process a grievance under the TWA-IAM agreement.

17. Whether Plaintiff took steps to bring his religious days off to the Local 1650 Relief Committee.

18. Whether the Defendant Unions took steps to assist Plaintiff in processing his grievance under the TWA-IAM agreement.

19. Whether throughout his employment at TWA, Plaintiff was aware that he could file a grievance to resolve a grievance or dispute against the Company.

20. Whether the District had any knowledge of the Plaintiff's religious beliefs until the case was transferred to the District level following the discharge hearing of March 31.

21. Whether defendant Unions took steps to assist Plaintiff in bringing his request for religious days off before the Local 1650 Relief Committee.

22. What was the manner of filling vacancies when a vacancy occurs on a weekend shift in the Stores Department at MCI.

23. Whether Defendant TWA attempted a reasonable accommodation for the observance of Plaintiff's religious beliefs.

24. Did TWA take any action to reasonably accommodate Plaintiff observing his Sabbath.

25. Whether accommodation of Plaintiff's Sabbath observance was possible for TWA without due hardship.

26. Was Twa willing to accommodate Plaintiff's Sabbath observance but prevented from doing so by Defendant Unions or any of them.

27. Whether Defendant Unions, or any of them, failed to properly represent Plaintiff in his discharge grievance against TWA.

28. Whether Plaintiff suffered any loss of income or benefits due to his discharge by TWA.

VII. *The Exhibits to be Offered at the Trial, Together with a Statement of All Admission by and All Issues between the Parties with Respect Thereto, are as Follows:*

a) Exhibits which may be offered by Defendant Unions 1650 and 142:

Union Ex. 1. Booklet entitled "Agreement between TransWorld Airlines, Inc., and International Association of Machinists and Aerospace Workers, Mechanics and Related Employees" signed August 25, 1966, consisting of one-hundred twenty pages.

Union Ex. 2. Booklet entitled "International Association of Machinists and Aerospace Workers Constitution, January 1, 1969" consisting of one hundred forty-two numbered pages.

Union Ex. 3. Booklet entitled "By-Laws International Association of Machinists & Aerospace Workers, District Lodge No. 142, Amended in Convention, 1967, Approved by International President, October 2, 1967" consisting of sixteen numbered pages.

Union Ex. 4. Booklet entitled "By-Laws of Air Capital Lodge 1650 International Association of Machinists and Aerospace Workers, Affiliated with the AFL-CIO, approved Effected by G. L. as of July 1, 1968" consisting of thirty-one numbered pages.

Union Ex. 5. Four page document entitled "Trans-World Airlines, Inc. Application for Employment" apparently completed by Larry Glen Hardison and dated February 27, 1967.

Union Ex. 6. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from E. H. Kussman, Manager, Systems Stores and dated October 11, 1968.

Union Ex. 7. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from W. J. Butcher, Supervisor Stores Planning & Control and dated March 21, 1969.

Union Ex. 8. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from W. J. Butcher and dated March 25, 1969.

Union Ex. 9. Two page handwritten document apparently notes of the Union committee at the discharge hearing, headed "Discharge—L. G. Hardison Co. Sen. 6-5-67".

Union Ex. 10. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from J. H. Frey, Hearing Officer, and dated April 2, 1969.

Union Ex. 11. One page letter on stationery headed "TransWorld Airlines, Inc." apparently addressed to Larry Hardison from Burns Prather, Manager, Industrial Relations, and dated April 14, 1969.

Union Ex. 12. One page document apparently addressed to Joe Bowman Assistant General Chairman, District 142 from Earl Box, Chairman, CKI Grievance Committee and dated April 7, 1969.

Union Ex. 13. One page document apparently addressed to Earl Box from Joseph W. Bowman and dated May 1, 1969.

Union Ex. 14. Two page letter on stationery headed "TWA TransWorld Airlines, Inc." apparently addressed to Charles E. Clark from James J. Mollenkamp, dated April 28, 1971.

Union Ex. 15. Three page letter apparently addressed to Charles E. Clark from Michael D. Gordon dated May 4, 1971.

Union Ex. 16. One page letter apparently addressed to Charles Clark from Thomas J. Cox, Jr. and dated May 13, 1971.

Union Ex. 16a. One page attachment originally enclosed with Union Exhibit 16 headed "Answer-TWA" written by L. G. Hardison.

Union Ex. 16b. Three page attachment originally enclosed with Union Exhibit 16 headed "Answer-Jolley, Walsh & Gordon" written by L. G. Hardison.

Union Ex. 17. One page document apparently a memo from Sandra Neese to Glenn Means dated May 3, 1971.

Union Ex. 18. Decision of the System Board of Adjustment (Ralph Steward, neutral) in Grievance No. 12346 arising in Kansas City, Kansas, dated November 3, 1968, consisting of three pages.

Union Ex. 19. Award and Opinion of System Board of Adjustment (Lennart V. Larson, neutral) transmitted to parties on May 20, 1965, involving Disciplinary Layoffs for Insubordination and consisting of eight pages.

Union Ex. 20. Report of Arbitration Proceedings, Opinion and Award (Marion Beatty, neutral) rendered September 10, 1965, involving L. R. Morris insubordination discharge and consisting of four pages and a one page appendix.

Union Ex. 21. Decision of System Board of Adjustment (Roy Ray, neutral) dated May 23, 1961, arising at LaGuardia Airport, New York, involving J. P. Murray insubordination suspension and consisting of nine pages.

b) Exhibits which may be offered by Defendant TWA:

D. TWA Ex. 1. Charge of Discrimination of Larry Glenn Hardison dated August 25, 1969 and attachments thereto. (eight pages)

D. TWA Ex. 2. Letter dated August 29, 1969 from Charles E. Clark to Sandra Neese. (one page)

D. TWA Ex. 3. Letter dated August 29, 1969 from Charles E. Clark to Larry Glenn Hardison. (one page)

D. TWA Ex. 4. Letter dated October 31, 1969 from Charles E. Clark to Larry Glenn Hardison. (one page)

D. TWA Ex. 5. Letter dated November 4, 1969 from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 6. Letter dated November 18, 1969 from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 7. Kansas City Area Office Charge Information Sheet maintained by the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 8. Receipt for Certified Mail dated August 29, 1969. (two pages)

D. TWA Ex. 9. Company Employment Record of Larry Glenn Hardison. (two pages)

D. TWA Ex. 10. Application for Employment of Larry G. Hardison dated February 27, 1967. (two pages, including the front and reverse sides thereof)

D. TWA Ex. 11. Letter dated October 11, 1968 from E. H. Kussman to L. G. Hardison. (one page)

D. TWA Ex. 12. Letter dated March 21, 1969 from W. J. Butcher to L. G. Hardison. (one page)

D. TWA Ex. 13. Letter dated March 25, 1969 from W. J. Butcher to L. G. Hardison. (one page)

D. TWA Ex. 14. Letter dated April 2, 1969 from J. H. Frey to L. G. Hardison. (one page)

D. TWA Ex. 15. Letter dated March 13, 1971 from Thomas J. Cox to Charles E. Clark, and attachments. (five pages)

D. TWA Ex. 16. Letter from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 17. TWA Attendance Records for Larry G. Hardison. (several pages)

D. TWA Ex. 18. TWA Stores Work Schedule. (several pages)

D. TWA Ex. 19. Notices of Vacancies at MCI. (several pages)

D. TWA Ex. 20. Agreement between Trans World Airlines, Inc. and the International Association of Machinists and AeroSpace Workers signed August 25, 1966. (one hundred twenty-eight pages)

D. TWA Ex. 21. W-2 Statements for Larry G. Hardison for the years 1967 to 1972 inclusive. (six pages)

D. TWA Ex. 22. Church Attendance Records of Larry G. Hardison. (number of pages unknown)

c) Exhibits which may be offered by Plaintiff:

Plaintiff Ex. 1. Equal Employment Opportunity Commission Regulation regarding employment duties of employer involving religious discrimination to all Equal Employment Opportunity Commission records.

Plaintiff Ex. 2. All personnel records and employment discipline records in the custody of the Defendants which are the subject to a Rule 34 Motion before the Court at this time.

Defendant Unions reserve the following objections:

(1) With respect to documents listed by Plaintiff, Defendant Unions state that Plaintiff's description is so vague and ambiguous that it has insufficient knowledge of the exact documents that may be offered by Plaintiff at the trial and therefore reserves all objections that can be appropriately made thereto.

(2) With respect to the following documents listed by Defendant TWA, Defendant Unions have no objection to the genuineness of such documents, but object to the subject material contained in such documents to prove the truth of any matter asserted therein as hearsay; Defendant Unions also object to the following documents as incompetent, conclusionary, immaterial and irrelevant to prove any wrongdoing on the part of Defendant Unions: D. TWA Ex. 1, 15 and 16.

VIII. *The Following Issues of Law, and No Others, Remain to be Litigated Upon the Trial:*

1. Whether the International was properly served with process.

2. Whether the purported service on the International is defective because James Tarwater is not "an officer or managing or general agent" or an "agent authorized by appointment or by law to receive service of process" within the meaning of FRCP4(d)(3).

3. Whether the Plaintiff properly filed his charge before the EEOC against Defendant TWA and each of the Defendant Unions within 210 days of the alleged unlawful employment practice.

4. Whether the District is responsible for any illegal acts of Local 1650.

5. Whether Local 1650 is responsible for any illegal acts of District 142.

6. Whether the International is responsible for any illegal acts of Local 1650 or District 142.

7. Whether any Union Defendants are responsible for any wrongful acts of Defendant, TWA, or vice versa.

8. Whether, absent intentional discrimination, unions are legally responsible for Title VII rights arising under Title VII or whether their duty is limited to fair representation of employees pursuant to the collective bargaining contract.

9. Whether there is any direct evidence of discriminatory intent on behalf of any Defendants.

10. Whether the IAM-TWA collective bargaining agreement is non-discriminatory on its face.

11. Whether any Defendant purposely attempted to discriminate against Plaintiff because of his religion.

12. Whether the Railway Labor Act requires that an employee discharged for "insubordination" which he alleges is protected by a religious privilege, must exhaust the grievance procedure set out in a collective bargaining contract established pursuant to the Railway Labor Act before instituting suit under Title VII of the Civil Rights Act of 1964 where his allegations of discrimination are on an individual, rather than a class basis.

13. Whether Title VII required reasonable accommodations at the time the Plaintiff's discharge occurred.

14. Whether each Defendant Union was under a duty to make reasonable accommodations for Plaintiff's religious beliefs.

14a. Whether TWA is relieved of liability if the Union did not properly represent Plaintiff.

15. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because it made reasonable accommodations to Plaintiff's religious needs.

16. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because the IAM Defendants pre-

vented TWA from accommodating Plaintiff's religious needs by refusing to permit Plaintiff to trade shifts or change sections.

17. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because it would have suffered undue hardship on the conduct of its business by making accommodations to Plaintiff.

18. Whether allowing Plaintiff to take off work Saturdays without pay, which was acceptable to the Union, or make other adjustments not inconsistent with the collective bargaining agreement, provided a "reasonable accommodation" that fulfilled the Unions' legal responsibilities.

19. Whether allowing Plaintiff to select shifts or jobs contrary to the express provisions of the collective bargaining contract would create undue hardships upon the Unions.

20. Whether to allow Hardison to select his shift or jobs contrary to the express provisions of the collective bargaining contract would violate the constitutional and religious rights of other Union represented employees who did not share the Plaintiff's religious beliefs but who celebrated another Sabbath, or who exercised their right not to celebrate any Sabbath at all.

21. Whether Plaintiff is precluded from asserting the claims herein since the lack of seniority which he had in March 1969 was caused by his own acts of bidding into a new seniority grouping where he knew or should have known, that his ability to select shifts would be greatly diminished.

22. Whether Plaintiff should have filed a grievance immediately when the Company first indicated it would not excuse his Sabbath absences and whether his failure

to do so, and his subsequent resort to self-help and purposeful disobedience to Company orders and work schedules precludes him from bringing this action.

23. Whether Plaintiff is precluded from enforcing his Title VII rights against the Unions by not cooperating with the processing of his grievance concerning his discharge and otherwise exhausting his rights under the collective bargaining contract.

24. Whether Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

25. Whether 42 U.S.C. Section 2000e et seq. is unconstitutional to the extent it purports to require an employer such as TWA to accommodate the religious needs of an employee such as Plaintiff in violation of the First Amendment to the Constitution of the United States which provides, in part, that "Congress shall make no law respecting an establishment of religion. . . ."

26. Whether if Plaintiff prevails in this action, Defendants' liability for backpay is limited to two years by reason of the 1972 amendment to 42 U.S.C. Section 2000e-5(g).

27. Assuming Plaintiff's Title VII rights have been violated, whether Defendant Unions are liable for any monetary damages and if so, which Union Defendants, and in what amount.

28. Whether or not Plaintiff was discharged by Defendant TransWorld Airlines because of his religion and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.

29. Whether or not the Local 1650 and District 142 and the International Association of Machinists and Aero-Space Workers violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e by any action taken towards Plaintiff.

30. The legal damages and reasonable attorney's fees to which Plaintiff is entitled if any Defendant or all Defendants are in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.

IX. The foregoing admissions having been made by the parties, and fee parties having specified the foregoing issues of fact, and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the final in this cause, unless modified to prevent manifest injustice.

....., 1972.

STIPULATION

(Filed October 26, 1972)

Come now the parties by their attorneys and stipulate to the following additional facts which are admitted and require no proof:

Trans World Airlines, Inc. (TWA or the Company) was incorporated as Transcontinental & Western Air, Inc. under the laws of the State of Delaware on December 27, 1934 by the consolidation of two Delaware corporations engaged in air transportation, one of which had instituted the first coast-to-coast air passenger service in 1930. The corporate name was changed to Trans World Airlines, Inc. on May 17, 1950.

TWA has been engaged in the transportation of persons, property and mail by air since its organization. During that time TWA has operated a transcontinental system in the United States. Since 1946 it has operated a transatlantic system which extends from the United States to points in Europe, Africa and Asia and since August 1969 a transpacific system between the United States and Asia which connects with its transatlantic system, thus providing an around the world service. TWA's wholly-owned subsidiary, Hilton International Co. (Hilton), operates 51 hotels in 35 foreign countries, Hawaii, Puerto Rico and St. Thomas in the United States Virgin Islands.

TWA's passenger business is the chief source of its revenues. Within the United States, TWA competes on almost all of its routes with at least one of the other ten domestic trunk airlines and on many of its major routes competes with two or more of such airlines.

TWA's international system encompasses travel between the United States and Europe, Africa and Asia. Of this route structure the United States/Europe traffic is of primary significance. TWA competes with 20 other International Air Transport Association (IATA) airlines, including one other United States flag carrier, and two non-IATA airlines, which operate scheduled passenger service between the United States and Europe. TWA carries cargo (mail, express and freight) on its domestic system and mail and freight on its international system and also operates military and commercial charter flights, the military being the more important of the two.

Under the Federal Aviation Act of 1958, as amended, TWA along with other air carriers, is subject to regulation by the CAB, the Administrator of the FAA and the Post Office Department. TWA operates over routes authorized by Certificates issued by the CAB. In addition, the opera-

tions of TWA's international system require the permission of the respective countries served and compliance with their laws and regulations.

Certificates issued by the CAB may be amended or suspended by the CAB, after a hearing, if in its opinion the public convenience and necessity so require, or they may be revoked for intentional failure, after notice, to comply with their terms or with the Federal Aviation Act or orders, rules or regulations under the Act. No Certificate may be transferred and no route may be abandoned without approval of the CAB. The issuance, renewal, amendment or revocation of international route Certificates by the CAB requires the approval of the President of the United States. Every air carrier must obtain a Certificate, or an exemption from the Certificate requirements of the Federal Aviation Act, in order to engage in interstate or foreign air transportation or the transportation of mail by aircraft.

In addition to its control over routes, the CAB regulates rates for transportation of United States mail and, in domestic transportation, passenger fares and rates for the transportation of property. Fares and rates for intrastate operations in certain states are subject to regulation by state authorities.

The Administrator of the FAA, whose functions are exercised within the Department of Transportation, is concerned, generally, with the regulation of flying operations, including aircraft, personnel, ground facilities and certain technical matters.

The Post Office Department has jurisdiction over certain aspects of the transportation of mail. Rates for airmail dispatched from foreign countries are fixed by the governments concerned pursuant to the Universal Postal Union Convention.

TWA had approximately 42,500 employees in 1969 (including approximately 2,500 working at the John F. Kennedy Space Center, but excluding approximately 21,000 employees of Hilton and its subsidiaries), of whom about 8% were based outside the United States. Approximately 53% of TWA's employees were covered by contracts with unions in 1969, including approximately 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aero Space Workers. At the present time TWA employs approximately 37,000 employees at approximately 100 locations.

Labor relations of air carriers are subject to Title II of the Railway Labor Act, as amended, which contains provisions giving employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's principal executive offices are located at 605 Third Avenue, New York, New York 10016. TWA's principal maintenance and overhaul base is located at Kansas City International Airport, Kansas City, Missouri 64153. The maintenance and overhaul facilities include Building No. 1, which is used for the overhaul of air frames and Building No. 2, which is used for the overhaul of aircraft engines. All of TWA's air frame overhaul work, as well as the overhaul and major maintenance of aircraft engines and aircraft components, is accomplished at the Kansas City International Airport maintenance and overhaul base.

The foregoing stipulation having been made by the parties, this stipulation shall supplement the pleadings and STANDARD PRE-TRIAL ORDER NO. 2.

STIPULATION

(Filed November 8, 1972)

COME NOW the parties and hereby stipulate and agree as follows:

1. That plaintiff, Larry G. Hardison, received the following wages for the respective years from each employer as stated below:

A. May, 1969 - July, 1969, Black, Sivalls & Bryson;

July, 1969 - October, 1969, Beal, Inc., 4001 Kaw Drive, Kansas City, Kansas;

October, 1969 - December, 1969, Kenworth Motor Truck Company;

Total wages through December, 1969 - $3,006.00.

B. 1970, 1971, Kenworth Motor Truck Company,

1970 - $6,855.00

1971 - $7,183.00

C. January 1, 1972, through October 17, 1972 (date of trial) - $6,645.00.

D. TOTAL OF A THROUGH C - $23,689.00.

2. That Plaintiff, Larry G. Hardison, would have earned the following wages at defendant, Trans World Airlines, Inc., assuming Mr. Hardison would have worked eighty (80) hours in each pay period (two weeks) from April 1, 1969, through October 17, 1972 (time of trial):

	Gross	Federal	FICA	State	City	NET
1969	$ 6,157.60	$1,087.60	$ 295.56	$ 74.85	$ 30.79	$ 4,668.80
1970	9,154.40	1,570.50	374.40	115.28	45.77	7,048.45
1971	9,900.16	1,576.80	405.60	146.30	99.00	7,672.46
1972	8,270.00	1,376.10	430.04	124.32	82.71	6,256.83
TOTAL	$33,482.16	$5,611.00	$1,505.60	$460.75	$258.27	$25,646.54

IT IS FURTHER STIPULATED AND AGREED that the preceding calculations took into consideration the following Contract Rate increases:

Rate		
4/7/69	$3.97	(New Contract Rate)
6/16/69	$4.08	(New Contract Rate)
2/1/70	$4.35	
8/1/70	$4.52	
1/1/71	$4.59	
5/1/71	$4.84	
6/14/71	$4.85	
1/1/72	$4.92	
6/12/72	$4.93	

3. That the monetary amount of the fringes and benefits available to plaintiff, Larry G. Hardison, if he would not have been terminated from the employ of Trans World Airlines, Inc. is contested by the parties and is submitted for determination by the Court. Plaintiff claims that fringe benefits have a value of 12.3% of plaintiff's base pay. This percentage was arrived at from TWA's proposed filing with the Pay Board, and the figure includes Group Insurance, Trust Annuity, Retirement Plan and Stock Purchase Plan, but does not include airline passes. Plaintiff claims that the gross monetary value of the fringe benefits that plaintiff would have been entitled to if he had

remained with TWA is 12.3% of $33,482.16, which equals the sum of $4,118.31.

Defendants claim that the value of fringes and benefits is speculative and conjectural and cannot be determined with reasonable certainty so as to constitute a proper element of damages. Further, defendants claim that the value, if any, of benefits which plaintiff would have obtained at TWA should be reduced by the value of benefits which plaintiff testified in his deposition he obtained in his other employment. Finally defendant TWA claims that if plaintiff's employment with TWA is reinstated as a result of this action, certain benefits may be adjusted to make plaintiff eligible therefor as if he had never been terminated in lieu of cash damages to plaintiff.

4. That TWA employees such as plaintiff were entitled to an allotment of four (4) passes on TWA flights during the years 1969 and 1970 and an allotment of five (5) passes on TWA flights in 1971 and 1972 respectively. This allotment is not cumulative from year to year and unused passes are forfeited. Plaintiff claims he is entitled to the monetary value of these flights which is submitted for determination by the Court. Defendants claim that the value, if any, of passes is too speculative and conjectural and cannot be determined with reasonable certainty so as to constitute a proper element of damages.

5. That during his employment plaintiff took one trip with his wife, or used two (2) passes; said trip was to Tampa, Florida.

The foregoing, having been submitted by the parties hereto, by and through their respective counsel, may or may not, in the Court's discretion, be included in a determination of plaintiff's damages, if the Court determines that plaintiff has been subject to a violation of Title VII of the Civil Rights Act of 1964.

STIPULATION

(Filed November 21, 1972)

During the trial of this cause a question was raised concerning the status of the employee in *Riley* v. *Bendix Corp.*, 4 E.P.D. ¶7902 (5th Cir. 1972). Counsel for TWA has contacted Mr. Aubrey L. Raymond, Regional Operations Counsel for Bendix, who furnished a letter dated October 31, 1972 concerning this matter, a true copy of which is attached hereto and made a part hereof. Based upon this letter the parties by their attorneys stipulate and agree that Charles Riley was a non-union employee of Bendix and was not covered by any collective bargaining agreement during his employment with Bendix.

BENDIX

The Bendix Corporation
Executive Offices
Bendix Center
Southfield, Michigan 48075

James Mollenkamp, Esq.
General Attorney
Transworld Airlines, Inc.
Room 1-319
Kansas City International Airport
Kansas City, Missouri 64153

October 31, 1972

Dear Mr. Mollenkamp:

In reply to your inquiry regarding Charles Riley's employment with The Bendix Corporation I have reviewed our litigation files and find that his position as a salaried

employee with the title of supervisor at our Launch Support Division is stated in the recent opinion of the Court of Appeals. A copy of the Court's opinion is enclosed for your information and use. You will find the statement I refer to on page two of the opinion.

In addition it may assist you to know that our supervisory employees are not unionized in this division and that Charles Riley was not covered by any collective bargaining agreement while employed by Bendix.

Please let me know if you require any further information regarding this matter.

Very truly yours,

/s/ Aubrey L. Raymond
Aubrey L. Raymond
Regional Operations Counsel

ALR: dw
Enclosure

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20096-1

LARRY G. HARDISON,
Plaintiff,

-vs-

TRANS WORLD AIRLINES, INC., et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that heretofore on Wednesday, the 18th day of October 1972, the above-entitled cause came on before the HONORABLE JOHN W. OLIVER, Judge of Division One of the above court, sitting at Kansas City, Missouri, and the following proceedings were had and entered of record:

The plaintiff was present in person and by his attorney, Mr. William H. Pickett.

Defendant TWA was represented by their attorney, Mr. James J. Mollenkamp.

Defendant Unions were represented by their attorney, Mr. Michael D. Gordon.

* * *

[35] LARRY GLENN HARDISON,

called as a witness in his own behalf, was duly affirmed and testified as follows:

Direct Examination by Mr. Pickett

[36] Q. And you are the plaintiff in this cause? A. Yes.

Q. What particular member, what particular religion, sir, are you a member of? A. The Worldwide Church of God.

Q. Would you share with the Court briefly when you first began to consider accepting the tenets of that religion? A. I began a study in early of '68, in the springtime, I believe.

Q. Did you at that time more or less come into the religion or follow the religion? A. I was speaking to my mother, who was also in the church, and she was guiding me along, and I did not start attending at that time nor following any of the major precepts.

Q. Now, sir, approximately what time in the chronological year of 1968 did you adopt the fundamental precepts and begin following, as you just stated to the Court, the Worldwide Church of God? A. It would have been late September or early October, 1968.

Q. All right, sir, you first began employment with TWA approximately 1967. During the period of time in approximately April 25, 1968, on what particular position were you with TWA and what particular shift were you [37] employed at with TWA? A. What time in 1968. I'm sorry, I didn't catch that.

Q. Yes, on April 25, 1968, where were you working for TWA, what were you doing and what time of day and what shift were you on? A. I was at Mid-Continent Airport. I was a stores clerk in the stock room, and I believe at that time I was on the twilight shift.

Q. The twilight shift being what? A. 3:30 to 11 o'clock p.m.

Q. At approximately September or October of 1968, when you stated to the Court that you began to follow the religion, what shift were you on, what position? A. I had the same position and I had transferred to the graveyard shift, which is 11 p.m. to 7 a.m.

Q. During that particular period of time, what building were you employed at? A. Building 1.

Q. During the period of time that you had transferred to the graveyard shift, did this provide any problem with any of your religious beliefs? A. No, sir.

Q. Why? A. Because I had Saturday and Sunday off, as such, graveyard being the first shift, when we were off Friday, that [38] began our weekend Friday morning, and we didn't have to go back to work until Sunday evening.

Q. When is the Sabbath, so the Court can get the chronological essence of your testimony? A. Sunset Friday to Sunset Saturday.

Q. Are there other religious holidays which the Worldwide Church of God observes? A. Yes.

Q. The first one of these beginning on what day, sir? A. Well, it is not any one set day. It is in the springtime, which is the First Day of Unleavened Bread.

Q. During the year of 1969 do you remember when the Day of Unleavened Bread fell? A. In April of '69?

Q. Yes. A. It was April 3, I believe.

Q. When were you discharged from TWA? A. April 2.

Q. 1969? A. Yes.

Q. That was the first religious holiday in 1969? A. Yes.

Q. Now, when you transferred to the graveyard shift, you did not have any trouble with your religion as far as observing the Sabbath, is that a fair statement? [39] A. Yes.

Q. When did you first encounter any problems with Sabbath leave? Did you remain on the graveyard shift and working in Building No. 1? A. Well, in December of '68 I transferred to the day shift in Building 2.

Q. Why did you do this, sir? A. So that I could be on the day shift. I was married at the time and that is more of a convenient time.

Q. Did you at that particular time while employed on the day shift have any difficulty with observing your Sabbath? A. Only when the man with less seniority than me went on vacation.

Q. Prior to March 6, or 7, or 8, of May 1969, did you have any difficulty observing the Sabbath while being employed in Building 2? A. No.

Q. What transpired on or about March 7 that caused you difficulty in observing the Sabbath? A. Well, March 8 was a Sabbath, and a man of less seniority than I went on vacation at that time, and beings as I was next up, I was required to work in his position, and I did not show up for work that day.

Q. Now, sir, when you say next up, would you care to amplify that for the Court, please? [40] A. Well, I was second from the bottom of the seniority group in the section that I worked, which was the Progress Department.

Q. In Building No. 1? A. Yes.

Q. On the daylight shift? A. Yes.

Q. What was that gentleman who, as I understand, his name is Bill Wyatt's days off? A. Tuesday and Wednesday.

Q. What were your days off prior to that? A. Saturday and Sunday.

Q. Be being in the position of taking his position, did this cause you any difficulty in observing your Sabbath, which I understand is basically Friday Sunset through Saturday Sunset? A. Yes, it did cause problems because I would have been required to work, and of course that is not acceptable, so I did not work that day.

Q. All right, sir. I will hand you what has been marked—

* * *

[41] A. Well, it is a letter written by me to Mr. Everett Kussmann, dated April 25, where I am requesting to meet him to see about changing my days off so that I might have either Friday and Saturday or Friday Sunset to Saturday Sunset off so that I might observe the Sabbath.

* * *

[81] Q. We have covered yesterday as to how you informed them, et cetera, et cetera, and then I believe around December 1968 you transferred into Building 2? A. Yes.

Q. Then did you have any difficulty observing the Sabbath while you were in Building 2? A. Only until—I kept the Sabbath until the man of less seniority than I went on vacation.

Q. All right, this would have meant that you would have worked on March 8 and March 15 to replace him, is that not correct? A. Yes.

Q. Now, did TWA at any time or did any of the Union officials in conjunction with TWA set up any meeting to discuss any way to eliminate this? A. Yes, before the first Sabbath I would have been required to work. Mr. Kussmann called me down to his office. Our Union steward, Mr. Tinder, was present during that [82] discussion.

The Court: Do you remember the date of that discussion?

The Witness: I believe it was March 8.

Q. (By Mr. Pickett) There has been no documentary evidence about that particular meeting, March 6. Would you share with the Court the extent that you can, the

best of your recollection, what transpired at that particular meeting? A. Well, Mr. Kussmann started out the conversation stating that he saw that a shift change was going to require me to work on the Sabbath, and of course I affirmed that there would be, and then we began discussing how to get around my requirement for work, not whether I would work or not but we discussed a possible shift change in that I knew that the man on the graveyard shift did not care for the graveyard shift, and so we talked about that. Then Mr. Tinder—well, let me state this, that it was acceptable with Mr. Kussmann that if it could be worked out, fine.

Q. Would you please be more specific when you say "worked out",-and what do you mean by worked out? A. Well, worked out by my shifting from the shift I was on to the graveyard shift and the man that was on graveyard shift switching to my position.

Q. All right, this would mean that you would remain in the [83] same building or section but a change in the hourly time of day that you would be working? A. Yes, sir, then it was proposed to Mr. Tinder and he said no, it would have to be by seniority, you know, for me to bump in there. Well, the man that was on that shift had higher seniority than I, so I could not bump him, so the next thing that was discussed was my transferring back to Building 1 in that I had planned on doing it after my time had elapsed. By this, I mean I had transferred to Building 2. As best I recall, there was a six-month waiting period before I could make another transfer back to where I was. Therefore, all that time had not elapsed yet and I had yet, oh, two or three months to go, and I proposed this to Mr. Kussmann, saying, you know, that I would like to go back, and if it could be worked out then that would be acceptable to me.

Q. Now, if you had went back, how would this eliminate your working on the Sabbath? A. I had enough seniority to hold weekends off, on the graveyard shift, at least.

Q. Which was the shift you had originally had before you bumped in to Building 2? A. Yes.

Q. And what particular type of acceptance did the Union have to this proposition? [84] A. They again negated the proposal, because the problem of seniority came up again, and also that my time had not yet elapsed, which, you know, meant that I could not bid until the six-month period, or however many months it was, was up, so I was limited there.

Q. Was there anything else discussed as to how to eliminate your working on the Sabbath, March 8? A. Well, I again told Mr. Kussmann that I would be willing to work six days a week if possible just so I could have one day off without any extra pay, overtime pay, just so I could have the one Sabbath off, the Sabbath that I needed, and, if I recall the conversation properly, Mr. Kussmann said, well, if I worked six days a week I would be paid for it, and then Mr. Tinder said, well, that I couldn't because of the 40-hour work clause.

Q. The 40-hour work clause is what, sir? A. Well, any time over 40 hours would be paid on overtime, and this is your standard work week.

Q. Now, the way I understand this correctly, in September, I believe it has been stipulated to, you had a meeting with Mr. Kussmann and Mr. Tinder was present at that meeting. A. Yes.

Q. And Mr. Tinder was also present at the March 6 meeting? A. Yes.

[85] Q. Now, you then—first of all, was there anything or any other type of plan discussed by either Mr. Tinder, representing the Union, or Mr. Kussmann, repre-

senting TWA, to eliminate your working on the Sabbath, March 8? A. No, there was no excused absence mentioned, that I recall, and if there was, it would probably—this is just probably, in that my memory is so fuzzy on this one area. We had discussed excused absence in our September meeting, and Mr. Kussmann said, well, he couldn't, you know, continue to excuse me every Sabbath, that, you know, I would have to work it out.

Q. Now, on about March 21, there was another meeting of which of course the Court has an exhibit in front of it. At that time was Mr. Tinder present? A. Yes, sir.

Q. Was Mr. Kussmann present? A. No.

Q. The other individual who held the meeting was Mr. Butcher? A. Yes.

Q. I know yesterday the Court was concerned about in the exhibit dated March 21, 1969, from Mr. Butcher to yourself, there were certain things stated as a matter of record. Mr. Tinder was present at the March 6 meeting with Mr. Kussmann? A. Yes, sir.

[86] Q. He was also present with Mr. Butcher and yourself? A. Yes, sir.

Q. I believe the document speaks for itself as to the meeting on March 21, 1969. You did not work on March 8, is that correct? A. That is correct.

Q. You did not work on March 15? A. That is correct.

• • •

[104] *Cross-Examination*

• • •

[115] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe you testified that in the spring of 1968 you began studying the [116] tenets of the Worldwide Church of God, isn't that correct? A. In the spring, I believe

I had started subscription to a magazine published by the Ambassador College, which is under the auspices of the Church, called "The Plain Truth". I was also reading some auxiliary material such as booklets on Evolution and so forth. It was a very, very light study. I was just getting into it as such. My mother, as I have previously stated, was already into it and of course she was trying to speed me up and telling me various doctrines and all.

Q. At that time was your degree of practice in that faith such that you needed to have Saturdays off to accommodate your religious belief? A. No, sir, my understanding wasn't that great at that time.

Q. When did that first become the case, namely, when under the practice of your faith did it become necessary for you to obtain Saturdays off in order to observe your Sabbath? A. Well, as my understanding grew deeper during that year, I became more deeply aware of what the Sabbath meant, what God commanded. In September I asked for a meeting with Mr. Kussmann and told him that, you know, this was going to be a problem, and I remember at that time my own conviction wasn't great, where I was going to say, [117] "I am going to take it off," because I thought at the time as long as I am working for it, God is going to forgive me. But as it grew, as my understanding grew, I saw that I was going to have to take it off, and so I put a bid in for the graveyard shift so that I could hold it. And this was during—when I was thinking, you know, well, as long as I am working for it, God is going to forgive me, and I still wasn't as such a hundred per cent convinced that it was, you know, commanded, and I should just not show up for work.

Q. Do you recall whether you worked on any Saturdays between the spring of 1968 and September or Octo-

ber of 1968 when you first came into the faith? A. Yes, sir, I did. I worked on Friday evenings, because I was on the twilight shift, and then on occasionally I would work overtime.

Q. Is there any single event under the practice of your faith that fixes a point in time when you must observe Saturday as a day off or Sabbath observance? A. Only when the understanding becomes so great that you see that this is a commandment of God, it is required, and that you are absolutely convinced that you've got to have it off. This was the point I was at, or just about at, I should say, in September.

Q. Was there a specific day in September when that happened? [118] A. Not that I recall, not a specific day.

Q. Is there anything in the records of your church which documents a specific day in September or October when you came into the faith? A. Well, I was not baptized until February of '69. My studying, you know, grew deeper and it grew deeper. I think in—well, around September I stopped working overtime on the Sabbath and just would work Sunday, but, yeah, I was still on, if I recall, the twilight shift and was still working a few hours.

Q. Did you receive Everett Kussmann's letter to you, dated October the 11th, which has been marked as Plaintiff's Exhibit 3 in this case? A. Yes, I did receive it.

Q. And Mr. Kussmann did indicate a willingness to consider your specific religious holiday requirements by that letter, is that correct? A. Yes, sir.

• • •

[128] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe you transferred to Building 2 on December 2 of 1968, is that correct? A. Yes, it was about that time.

Q. And was that a voluntary bid on your part? A. Yes, sir.

Q. You were not required by the company to transfer? A. No.

Q. What was your particular job in Building No. 2? A. Building 2? Well, I was in the Progress Department, and my specific job in that department was to run the train, as it was called, which is to go to each shop, pick up or deliver material, just continually make rounds in that fashion.

Q. And do you know where those parts are delivered to that you pick up? A. To the various shops for rework or reassembly of engines.

Q. And those parts eventually become incorporated in the [129] engines, is that correct? A. Yes.

Q. Now, were you the only one in that particular job of train men? A. Yes.

Q. Now, are Building No. 1, Stores Stock Room Section, and No. 2, Stores Progress Section, within separate seniority groups? A. Yes.

Q. What was your relative seniority within Building 1, Stores Stock Room Section, prior to your bid to Building 2? A. Well, it is kind of hard to remember. I wasn't on the bottom. I was about halfway up, I think.

The Court: Next to the bottom, weren't you, in Building No. 2? Isn't this the documentary evidence?

Mr. Mollenkamp: Well, my question is, what was his relative seniority in Building No. 1 before he transferred.

The Court: Much better.

Mr. Mollenkamp: That is correct, and he has testified—

The Court: Is there any disagreement about what the documentary evidence shows, and also that when he voluntarily moved and changed to Building No. 2, that

[130] he couldn't bump somebody to save it, and that the operation of seniority meant that he was going to be fired? Isn't that the undisputed fact?

Mr. Mollenkamp: It is so far as I am concerned.

The Court: Well, I don't think there is any quarrel with that.

Mr. Mollenkamp: Would you stipulate to that?

Mr. Pickett: I would, Your Honor.

The Court: You took the position that if he could save himself by reason of seniority, that is fine. If he couldn't, it was too bad. Isn't that true?

Mr. Mollenkamp: Yes.

The Court: All right.

Q. (By Mr. Mollenkamp) Isn't it also true, Mr. Hardison, that at the time you bid to Building 2, Stores Progress Section, that you could have gone to the graveyard shift or the twilight shift and not placed yourself within such a perilous position in terms of relative seniority? A. Well, as far as I know, the only opening was on days, because that is the only time the train ran, if I am not mistaken.

Q. Now, I believe you testified that in March you had a meeting with Everett Kussmann and James Tinder. That was March of 1969, is that correct? A. Yes.

[131] Q. Who initiated that meeting? A. Mr. Kussmann did.

Q. Do you know why he initiated the meeting? A. Well, apparently he had seen that the man below me was going on vacation and this man below me had Tuesday and Wednesday off and worked weekends, and that he realized that I would be required to work weekends.

Q. Now, was it Mr. Kussmann who suggested that your religious needs might be accommodated by a trade of shifts? A. I don't remember whether it was him or I, but it was discussed, yes.

Q. Was that agreeable to Mr. Kussmann? A. Yes.

Q. Was it agreeable to Mr. Tinder representing the Union? A. No.

Q. Was it also Mr. Kussmann who suggested that your religious needs might be accommodated by a change of sections? A. No, sir, I suggested that.

Q. Was this agreeable to Mr. Kussmann? A. As far as I remember, it was.

Q. And was that agreeable to the Union? A. No, sir.

The Court: Let me be sure that I catch this. Do I understand this testimony and anticipate what your evidence will be, that Mr. Kussmann was agreeable to a [132] trade with another employee, but this was vetoed by the Union.

Mr Mollenkamp: Yes, sir.

The Court: And you agree with that.

The Witness: Yes, sir.

The Court: All right.

Mr. Mollenkamp: And for further clarification, Mr. Kussmann was agreeable not only to a trade of shifts which would have been within the same section, but Mr. Kussmann was also agreeable to a change of sections; in other words, have the plaintiff go into a different section.

The Court: Can you tell me, also, will it be his testimony, and may we have a possible conflict in evidence, that it would have been agreeable to him, even though it may have been in an apparent violation of seniority?

Mr. Mollenkamp: I believe Mr. Kussmann's testimony will be that it was agreeable to him if the Union—

* * *

[142] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe it is stipulated in our pre-trial order that you

did not report for work on March 8, March 15, or March 22 of 1969, is that correct? A. Yes, sir.

Q. On or about any of those dates did you attempt to bring a grievance arising out of either the company's or the Union's refusal to accommodate your religious needs? A. No, sir.

Q. Did the Union initiate a grievance in your behalf on or about any of those dates arising out of the company's refusal to accommodate your religious needs? A. No, sir.

* * *

Q. (By Mr. Mollenkamp) Now, at any time on or about those dates, namely, March 8, March 15, or March 22, did you seek or request relief from the Union Relief Committee? A. No.

[143] Q. And at any time on or about those dates did the Union seek relief in your behalf before the Union Relief Committee? A. Not that I know of.

Q. So that at no time prior to the discharge did you take any action by way of grievance or by way of action before the Union Relief Committee to resolve the question of your religious needs? A. I didn't file a grievance nor did I even know of a Relief Committee.

Q. Were you furnished with copies of the constitution and by-laws of the Union? A. Yes.

Q. Were you also furnished at the time of your employment a copy of your collective bargaining agreement between TWA and the IAM? A. Yes.

The Court: Did you ever read either one?

The Witness: Yes, sir.

The Court: Before this happened?

The Witness: Yes, I had read the contract and had glanced over the constitution.

* * *

[147] *Cross-Examination by Mr. Gordon*

Q. Mr. Hardison, when was the first time that the Union, that you know of, had knowledge of your religious requirements, as you asserted them? A. Well, Mr. Tinder was in my discussion with Mr. Kussmann in September, and as far as I know, that is the earliest.

Q. In September 1968? A. Yes.

Q. Now, it is true, isn't it, that you had a number of conversations with the Union—excuse me, with the company prior to that time discussing your religious requirements? A. Not in number. I had talked to Mr. Kussmann once previously to this.

Q. Well, you wrote him a letter, didn't you, on April 25 of 1968, saying as follows: "Would like to see you about a change in weekly days off. I wish to request either Friday or Saturday off from Friday Sunset to Saturday Sunset off, with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is I sincerely believe this is the Sabbath and no servile work may be [148] done then"? A. Yes, that is the letter I wrote.

Q. You wrote that letter to Mr. Kussmann on April 25, at least it was dated April 25, 1968? A. Yes.

Q. And you had a discussion with Mr. Kussmann concerning that letter at that time? A. I believe it was shortly after.

Q. And the Union was not present? A. I do not recall whether Mr. Tinder was there or not.

Q. When did you start changing your life style or your life habits, your habits of living, to conform with the requirements, as you understood them, of the World-wide Church of God? A. Well, I tried changing as soon as my understanding, you know, grew—grew, such as earlier that year in '68—not earlier than April, but

earlier than September, I came to find that certain foods should not be eaten, so I tried to discontinue all of that type of thing. Let's see, what else?

Q. This was when? A. This was prior to September of '68, where, as I say, I came into the knowledge that certain foods shouldn't be eaten, so I tried to abstain from those foods.

Q. Would this coincide with your beginning of studying of [149] the religion? A. Yes.

Q. When did you begin to study the religion? A. Spring of '68. This is, of course, what, brought the letter on.

* * *

[150] Q. (By Mr. Gordon) I believe you originally told me that to your knowledge the first notice that the Union had of your religious belief was in September of 1968, is that correct? A. As best I can recall.

Q. This was at a meeting with Mr. Kussmann and Mr. Tinder? A. Yes.

Q. What was discussed at that meeting concerning what your religion required and how long you had been in it? A. Well, I of course hadn't been in it as such, attending regularly or anything like that, but we discussed what the Sabbath was. I told Mr. Kussmann I was coming into a deeper knowledge of it and I could foresee a problem. At that time I believe I had already put in a bid for a different shift so I could observe the Sabbath, that I was going to try to work it out with the seniority system and, you know, try not to create an upset.

[151] Q. The fact of the matter is, you had talked to Mr. Kussmann previously without the Union? A. As far as I know, yes.

Q. Who called the Union into this meeting on September 6? Did you? A. I assume Mr. Kussmann did.

Q. Do you know whether it is the practice to call a Union Representative in when a matter concerning employment is discussed with an employee? A. It was the standard practice then.

Q. Who was Mr. Tinder, in terms of what he did? A. He was our Union steward for our group.

Q. Did he work fulltime at that? A. Yes, as far as I know.

Q. Well, the fact of the matter is, he was an employee like yourself. A. Oh, yes.

Q. And he worked fulltime in whatever job he performed for the company. A. Yes.

Q. And if a Union matter came up, he was called in as the lowest echelon of Union Representative, isn't that correct? A. Yes.

Q. And you knew you could go over his head if you didn't [152] agree with him, isn't that correct? A. Yes.

Q. And you knew that he didn't have the authority to establish Union policy, he only had the authority to be present during the discussion? A. No, I didn't know that he had the authority.

Q. Were you satisfied as a result of the consequences of the September 6 meeting? A. I was quite relieved. Mr. Kussmann indicated a willingness to let me have the annual days off, and like I had told him, I was going to try to work it out with seniority so I could have the Sabbath off, and I thought things would work quite smoothly.

Q. The Union voiced no objection over anything that was decided at that September 6th meeting? A. Not that I recall.

Q. On December 2nd, or thereabouts, sometime in December, I believe you switched seniority groupings and we have discussed that— A. Yes.

Q. —in some detail. Isn't it true that at the time of your bid from one building to another you discussed with your father-in-law at that time the fact that you would be put into a lower seniority grouping and that your chances of having to work weekends would be greatly [153] increased? A. If I talked to him about it at all, I told him that I was transferring over so I could work the day shift.

Q. Do you recall talking to him at all? A. Not any specific discussion, no.

Q. Do you recall ever talking to him about the consequences of your bid from one job into another? A. No, not unless he brought it up.

Q. Well, I am not asking who brought it up, I am asking if you have discussed with him the consequences of you changing from one seniority group to another. A. Not that I recall.

* * *

Q. And I don't want to put words in your mouth but I want to see if I understand what was talked about at that [154] meeting. As I understand it, it became apparent that you would have to work on Saturday and three alternatives were discussed; one, the swapping of a shift; two, the transferring of shifts; and three, working four days a week or six days a week not on Saturdays and if you worked six days either being paid six days a week, or if you worked four days a week, being paid for four days a week. Do you follow me? A. Well, most of that is correct. We did discuss shift swap. We discussed Section swap and I reiterated my willingness to work six days a week if need be to make up for the time I would be off or however we could work it out where I could work extra to do so.

Q. You also indicated a willingness to work four days a week? A. If I did, I don't remember it, but I might have.

* * *

Q. (By Mr. Gordon) Mr. Hardison, let me show you the deposition that we took from you in this case. You recall the taking of the deposition, don't you? A. Oh, yes.

Q. Let me direct your attention to Page 87, the line beginning at Line 21: "QUESTION: Did Mr. Tinder discuss with you the possibility of you taking time off and not being paid? ANSWER: I brought it up. I said, 'I will [155] be glad to take the time off. I don't want my pay if I can have the time off, that will be good enough.' Mr. Kussmann could not allow that." Were you asked that question and did you give that answer at the depoaition? A. Yes, as best I can recall, I did.

Q. Now, after a little dialogue we have just gone through, do you recall mentioning working four days a week and being off one day and not being paid? A. The only day I didn't want to be paid is the Sabbath I wouldn't be working. Like I said, I still don't recall speaking of a four-day week.

Q. In any event, when you discussed the swap of shifts, what was discussed on that particular question on March 6th? A. Well, in that I had worked days and talked to the man that was on graveyard shift. I found that he was unhappy with the shift, and this was brought up. I told Mr. Kussmann, with Mr. Tinder present, that if we could just swap me from the shift I was on to graveyard shift, this would be great because graveyard shift is considered first shift.

Q. Now, you hadn't actually worked out an agreement with the man on the graveyard shift, with swapping, did you? A. No.

Q. And you didn't know for a fact that he was willing to [156] swap? A. No, I didn't.

Q. What was Mr. Tinder's reaction to that discussion? A. He brought up that only if I could bump him out could I make that change.

Q. Would it be fair to say that he had no objection to you making that shift if the job opening was put up for bid and you were the most senior man to bid into it? A. That is correct.

Q. Now, what about the transfer of departments—was that basically the same thing, in other words, to shortcut it, that Mr. Tinder had no objection to your transferring shifts if the job opening was put up for bid and you had the seniority to bid into it? A. Well, if I recall the discussion correctly, I was under obligation to stay in my slot for X number of months until that time expired, then I could jump out, or bump out, if a job opening was available, say, back over in Building 1. And it was only according to that and seniority, could I have bumped into it.

The Court: Mr. Gordon, I still can't understand, and why I keep interrupting every counsel, but I would like to know your theory of relevancy of this line of examination.

Mr. Gordon: If I can ask one more question [157] I think it will become apparent. If it won't, then I would be glad to explain it, but I think there is one more question and I will get to it eventually.

The Court: All right, but don't get into the spot of the fortune teller. You have one question and then answer my question as to how this line of examination is relevant.

Q. (By Mr. Gordon) Isn't it true that if an employee in another shift or another department left that shift and that department and created a vacancy, that if you were

allowed to transfer to that shift or that department, outside of the seniority, then a more senior employee would be deprived of his seniority rights?

Mr. Pickett: I object to that on the ground, Your Honor, this gentleman, I don't believe, is qualified—

The Court: The objection will be overruled. Answer it and then you answer my question.

A. If the opening was a valid opening and I took it over, someone that had more seniority, yes, it would be in violation of his seniority rights.

The Court: Now you tell me what this is all about. What difference does it make if you are under obligation to follow the laws of the United States, and if the laws of the United States require a nondiscriminatory practice as far as religion is concerned?

[158] Mr. Gordon: The basis is that I suppose we just basically disagree on the statement of the issues in the case. There is no question, I suppose, if you frame any issue that is phrased in the terminology of, can you violate the law, then obviously we can't violate the law. That is what the trial is about.

The Court: And you have taken the position consistently from the first time you ever heard about it, and I say "you", I mean the Union, but the question was in complete exercise of a legal right in discharging this man for insubordination; indeed, the only argument you ever made to anyone was either a technical argument that one of your employees representing himself hadn't dotted all the i's and crossed all the t's and therefore cannot invoke the jurisdiction of this district court of the United States, or, secondly, you say, "Well, we will go through the form of representation by contending that discharge is a little rough in this case," and you submitted to somebody a set of arbitrations involving the question of whether or not someone at either La Guardia or Ken-

nedy Airport was wearing an unauthorized jacket and he got fired and it was taken to arbitration and the arbitrator held, with great reluctance, that the determination of whether somebody ought to be fired for wearing something other than a company jacket [159] was really too rough a penalty because other people in the past had worn khaki jackets and therefore modified the discipline.

You didn't raise any question at any time as to the legality and the right of the company to fire him for insubordination under the circumstances of this case. Indeed, you agreed with it and you maintained, and you maintain consistently now, just exactly as the company does, that it is an undue hardship as a matter of law to make any accommodation contrary to seniority requirements by what I assume is the handful of Sabbaticals that are in the employ of TWA, and you continue to maintain that position.

Mr. Gordon: Well, it is just not the way that I would state our position.

The Court: No, you would state your position, and all kinds of hocus-pocus, and you would try to get this Court, you would try to get this Court to make some sort of a finding of fact that is directly contrary to the written position that you have taken.

I couldn't describe better than someone in the lower echelon who took a first step on behalf of this man as to what kind of case is involved here, and that is, "It is a sad case, a terribly sad case."

Mr. Gordon: Well, unfortunately, as far as I [160] know, we don't have any jurisdiction to protect any employees against sad cases.

The Court: Oh, no, and you claim you have no duty to go after an employer who may have violated the laws of the Congress of the United States, because you say, "That law cannot be read as being a part of our contract.

Now, we are very, very interested if there is a discharge contrary to our agreement, but we do not consider the Civil Rights Act of 1964 as a part of our agreement,"—

Mr. Pickett: I would like—

The Court: —"therefore, you may disregard it with impunity."

Mr. Gordon: That hasn't been our position as far as I am concerned.

The Court: Why isn't it your position right now? When have you ever said that the discharge for insubordination by TWA is contrary to law?

Mr. Gordon: Pardon me?

The Court: I say, when have you ever said that the discharge by TWA, even remotely contrary to law—

Mr. Gordon: There is some basic disagreement, I suppose, on whether you have to say what I would characterize as some sort of magic words in using the Title 7 context or whether you can go ahead and take [161] actions which would still be legal under Title 7.

The Court: I will just ask you a very, very simple question, and if you don't understand it, you have me rephrase it. It is my understanding that the Union's position throughout this controversy, and the Union's position right now, is that TWA took fully legal action when they discharged the plaintiff in this case, and that there was no possible violation of the Civil Rights Act of 1964.

Mr. Gordon: That is not correct.

The Court: All right, you tell me then when you say TWA may have violated the law.

Mr. Gordon: I can tell you that we never said that TWA violated Title 7, if that is what you are getting at.

The Court: Yes, and you give me a negative answer as to what your position is, but when I ask you to specify

when TWA may have violated the law, you say, "Well, that has just never happened yet."

Mr. Gordon: No, I say that we never expressly articulated our opposition in terms of a violation of Title 7, that is true, and we can stipulate to that if the Court wishes. We did object to the discharge. We objected to it on March 31, when it occurred. Under the contract the procedure that has been followed is that [162] the discharge grievance goes to the district.

The Court: Mr. Gordon, does the Court misunderstand your position in this case when you contend that neither TWA nor the Union violation Title 7 of the Civil Rights Act?

Mr. Gordon: That is correct, but for a different reason.

The Court: I understand, but isn't it your position, regardless of what the reason is, that neither you nor TWA ever violated Section 7 of the Civil Rights Act?

Mr. Gordon: My position is that the Union has never violated Title 7 of the Civil Rights Act, and the company will have to defend for it.

The Court: And your position also is that TWA didn't violate it?

Mr. Gordon: I think so.

The Court: All right, on cross-examination I find out that what I stated as to my understanding of your position is accurate.

Mr. Gordon: But whether TWA violated Section 7 or not is not dispositive of the question of whether the Union has violated Title 7.

The Court: Well, you don't contend anybody violated it.

[163] Mr. Gordon: Well, my argument, I hope, is more sophisticated than that.

The Court: Well, I don't care whether it is sophisticated or not. Sometimes unsophisticated arguments are correct. When somebody has to get sophisticated, it becomes a little difficult to get the sophistication off.

You know the origin of sophistication, do you not?

Mr. Gordon: I think I want to change my adjective.

The Court: Well, you better read your Plato and Aristotle to find out who the Sophists were in ancient Greece. It is my understanding throughout this case that the consistent position of both TWA and the Union is that they never violated Section 7 of the Civil Rights Act at any time.

Mr. Gordon: All I can ask is about four sentences worth of explanation. I just can't give you—

The Court: Well, you can have five or six. Is my understanding correct? Let's take it just to the Union itself.

Mr. Gordon: Fine.

The Court: You are contending that the Unions you represented never at any time violated Title 7 of [164] the Civil Rights Act of 1964.

Mr. Gordon: That is absolutely correct.

The Court: That is exactly correct, and that is the position that you took before every administrative body, it is the position that you took before TWA; indeed, you said to TWA, "You didn't violate, either. We are both as clean as the driven snow, because it is an undue hardship for us to make any accommodation in connection with this particular case. Now, we haven't tried very hard, but we don't have to try very hard, because it is a per se hardship to violate seniority."

What did the Union do to try to find somebody to swap with this young man? The answer is, "Nothing." Isn't that true? You said, "We didn't have to do that"?

Mr. Gordon: No—

The Court: Well, what did you do?

Mr. Gordon: We said that if the job opening ended up—and this is the point we started off with, maybe if I can make this—

The Court: Why don't you just answer my question, what did the Union to do inquire whether anyone in their membership would be delighted—

Mr. Gordon: Your Honor—

The Court: —to swap with this guy, irrespective of seniority.

[165] Mr. Gordon: We don't start out from the basic set of assumptions. If I could just clarify one point. If I don't direct myself to it, I will be glad to try. It was not the man who swaps jobs to swap. When a vacancy opens up, the most senior employee is entitled to the job. We cannot say that Mr. Smith over here has 30 years of seniority—

The Court: Mr. Gordon, let's get this witness completed, because I am trying to—

Mr. Gordon: I'm sorry.

The Court: —to get some theory of fact, and I asked you a specific question as to what the Union did, and I asked you that question for the reason that I wanted you to make inquiry of this plaintiff, "Did you know that we circulated among our membership a request of people that regardless of seniority would like to get the weekend off," and to see whether he knew about that and whether he willfully, knowingly and intelligently said "No, I don't want to do that. I want to stand up and be a martyr and be fired because of my belief, because of my religion."

You can go ahead and talk to him, because I want to find out what they did do. It is my impression that you said, "We don't have to do anything, and therefore we didn't do anything." If you didn't think you [166]

had to do anything, why in the world would you do something?

(Off-the-record discussion between Mr. Mollenkamp and Mr. Gordon.)

Mr. Gordon: Your Honor, I could tell you what I think the facts are, if that is what you are aiming at. We were totally agreeable to any adjustment that could be made for the plaintiff as long as it didn't deprive another employee of the seniority rights.

The Court: I understand that.

Mr. Gordon: Okay, that included taking a day off—

The Court: And what you are saying is that if it did, then all bets are off?

Mr. Gordon: Well, Judge, it is hard to—I would like to tell you what we said. We said if a job opening opened up, if he was the most senior employee, then he could have it. Now, if that is wrong, it is wrong, but that was our position.

The Court: Why, certainly, that is your position in connection with any substitution, religious reason or any other reason. That is straight Union doctrine. Do you think this is the first labor case this Court has ever had?

Continue the examination of the witness. I [167] want to get him off the stand so we can get on to getting into this record what other additional relevant evidence in addition to that which is stipulated and that which is clearly apparent from the documentary evidence in this case, which I have studied.

Q. (By Mr. Gordon) Mr. Hardison, I want to go back to the March 6th meeting. I believe you said that on the suggestions concerning shift changes and department changes, I believe your terms were that the Union vetoed that, is that correct? A. Yes, sir.

Q. Do you know what power the Union has to veto acts of management? A. Well, Mr. Tinder said that,

you know, if it could be worked out, seniority, fine; but, you know, just to take—put me in a slot such as the graveyard shift, or if the man was willing to change, fine, or if I could go to a different department, if there was an opening fine; but to take me unnaturally out of my slot and put me unnaturally in a slot—

Q. That is not really my question, and maybe I didn't phrase it properly. My question really is, couldn't the company have done what it damn well pleased, even over the Union's objection? A. I think they could have, yes.

[168] Q. The company runs the plant out there, don't they? A. Well, they are supposed to, yes.

Q. Now, was there any job up for bid that you know of on March 6th? A. Not that I know of.

Q. In fact, you know there was no job open for bid? A. Yes.

Q. And in fact, you know that if there would have been a job open for bid, you wouldn't have had the seniority to bid them? A. I might have had the seniority. It would have, of course, depended upon the job.

Q. Let me direct your attention to Page 89 on the deposition, starting at Line 5: "QUESTION: Actually I probably misspoke. I suppose it would be fair to say the Union had no objection to you changing shifts if you were the most senior man on the bid? ANSWER: If I could bid into something else, that would be correct, but there was nothing I could bid into. QUESTION: Were the jobs up for bid? ANSWER: No, there were no jobs up, was one problem. There was no jobs up for bidding to start with, and secondly, I did not have the seniority to bid them." Were you asked those questions and did you give those answers? A. Yes.

[169] Q. Were they true when you gave them? A. As far as I recollect, yes.

Q. And do you recollect that they are true now?

The Court: Mr. Gordon, how can there be any dispute about that?

Mr. Gordon: Well, I don't think it has been established that there were no jobs open for bid. I'll go on.

Q. (By Mr. Gordon) After the March 6 meeting were you satisfied with the way things stood? A. No, sir.

Q. Why not? A. Well, because I was going to be required to work on the Sabbath.

Q. Now, you kn[illegible]v, did you not, that you could file a grievance if you didn't like something that was going to happen to you out at TWA? A. Yes.

Q. But you didn't file a grievance, did you? A. I believe I spoke to Mr. Tinder about obtaining other counsel or in some way, you know—

Q. Did you know that you could file a grievance? A. Yes.

Q. Did you know that Mr. Tinder was overseen or supervised by the Grievance Committee? [170] A. Yes, I believe I know that.

The Court: Did Mr. Tinder or any member of the Union ever indicate to you that they thought that you may have some rights that were protected by the 1964 Civil Rights Act?

The Witness: No one mentioned it.

The Court: Did they ever mention it at any time, ever mention the Civil Rights Act at any time?

The Witness: No, sir.

The Court: Talking seniority all the time.

The Witness: Yes, sir.

Q. (By Mr. Gordon) After the March 6 meeting, you knew you could file a grievance. A. Well, yes, I thought I could.

Q. And did you know also that under the collective bargaining contract, only an employee can file a grievance? A. Yes.

Q. And did you know that the Grievance Committee was Mr. Tinder's superior in matters regarding grievances? A. Yes.

Q. And you knew where the Grievance Committee was? A. No.

Q. You didn't know where the Grievance Committee was? A. No, sir.

* * *

[186] Q. Do you recall the Grievance Committee telling you at that meeting that if you wished to go to court, that that was your right? A. No.

Q. At the March 31 discharge hearing, I think we can agree that the Union argued that your discharge was too severe a penalty, is that correct? A. Yes.

Q. At any time did the company—at any time during that meeting did the Union indicate to you or to the company that they thought you should be discharged? A. No, they didn't—you know, the Union didn't say discharge him. They just said they thought discharge was too severe a penalty.

Q. Did they ever agree with the company that they thought [187] you should be discharged? A. No.

Q. You were present at the hearing, of course? A. Yes.

Q. You didn't—obviously you didn't bring up that you thought your Title 7 rights were being violated because you have just testified you didn't know it at that time. A. No, I wasn't called upon for any testimony.

Q. Now, if your deposition reflects that you did indicate to the Union that your Title 7 rights had been violated at the March 31 meeting, then your deposition is incorrect as to that fact? A. Well, if I said it, I was just going on, you know, what I thought it would be true at that time.

Q. But you are testifying now, and the fact is now, you now understand it, that at the March 31 meeting with the Union you did not tell them that your Title 7 rights had been violated, because you didn't know at that time what federal law provided? A. Right. Like I said, I don't recall ever saying anything about my civil rights.

Q. Now, your discharge was effective on April 2, is that correct? A. Yes, sir.

Q. And that decision was made by Mr. Frey? [188] A. Yes.

Q. And he is an agent of the company? A. Yes.

Q. And to your knowledge the Union didn't encourage him to reach that decision? A. Not to my knowledge.

Q. Do you recall talking to the Union Grievance Committee on the way out of the hearing on March 31? A. No.

Q. Do you recall not talking to them after the meeting? A. I don't recall a whole lot since it has been too long.

Q. All these factors are just so vague in your mind that you can't remember too well, one way or the other? A. I don't remember any subsequent conversations, no.

Q. There could have been some and you don't remember. A. As I said, it is possible, but I don't recall any just now.

Q. You did recall a subsequent conversation with Mr. Box in which your resignation was discussed, as you described to Mr. Pickett? A. Yes.

Q. That is all you remember right now? A. Yes.

Q. Isn't it true that the subject of your discharge was not—I'm sorry. Isn't it true that the subject of your [189] resignation was not discussed after the discharge hearing but before? A. That I talked to them about resigning before the discharge hearing?

Q. Yes. A. No, I don't think I did.

Q. Didn't the Grievance Committee tell you when you met with them when you discussed possible defenses and possible alternatives, that one possibility was a resignation, and if you went ahead with the hearing that they had never known the company to allow a resignation after they had issued a discharge letter? A. If they said it, I don't recall it.

Q. Following the time that you received your discharge letter, did you ever have a meeting set up with Joe Bowman? A. No, sir.

Q. Did you know that the grievance pursuant to the collective bargaining contract automatically transferred from the local to the district after your hearing? A. No.

Q. You didn't? A. No.

* * *

[193] Q. Did any steward, Grievance Committeeman, local Union official, district Union official, international Union official, ever make any remarks derogatorily against your religion? A. None that I recall.

Q. That would be something that would stick out in your mind, since you regard your religion rather seriously? A. I imagine it would be.

Q. Did the Union ever object to you working out some sort of adjustment to your schedule as long as that adjustment did not deprive a more senior employee of his rights under the contract? A. No.

Q. And if you were allowed to bump out of the seniority, either to transfer shifts or bid shifts under the contract, that you weren't entitled to, it would necessarily mean that an individual who didn't share your religious beliefs would be deprived of his rights that he assumed he was entitled to under the contract? A. That is true.

Q. Didn't you go back to the company following your discharge and asked to be rehired? A. Yes.

Q. And was the Union present at that time? [194] A. No.

Q. Did the company accept your application for rehire? A. No.

Q. Was that the company's decision and the company's decision alone, as far as you know? A. As far as I know.

Q. I asked you if the Union ever made any derogatory statements directed against your religion. Did anyone in the Union ever make any derogatory statements directed at you? A. Well, I don't recall any other—no, I don't recall any direct ones.

Q. Would you say that your relationship with these Union people at these various meetings that you had with them was cordial? A. Yes.

Q. There wasn't any hostility at those meetings directed toward you? A. None that I recall.

Q. Do you remember how long the district has to appeal a discharge under the collective bargaining contract? A. No.

Q. Did you make any effort to find out under the contract? A. Not that I recall.

* * *

[198] *Redirect Examination by Mr. Pickett*

Q. Mr. Hardison, at any time did anyone ever explain to you what the Union Relief Committee was? A. No, sir.

Q. To this day do you know what it is? A. No, sir.

* * *

DEPOSITION

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

Civil Action

No. 20096-1

LARRY G. HARDISON,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1650,
Defendants.

THE DEPOSITION OF THE PLAINTIFF, produced, sworn and examined on behalf of Defendant TWA, pursuant to Notice to Take Depositions, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Tuesday, August 15, 1972, at the offices of TWA, 1307 Baltimore, in the City of Kansas City, in the County of Jackson and State of Missouri, before me,

GERALDINE DUEBBERT
of
MILES and BEHRENS,
Shorthand Reporters,

a Notary Public in and for the County of Jackson, State of Missouri, in a certain cause now pending in the District

Court of the United States for the Western District of Missouri, Western Division, wherein LARRY G. HARDISON is Plaintiff and TRANS WORLD AIRLINES, INC., AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1650 are Defendants.

[2] APPEARANCES

For the Plaintiff:

Mr. William H. Pickett
1100 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri

For Defendant Trans World Airlines:

Mr. James J. Mollenkamp
Room 1-323
Kansas City International
Airport

For Defendants International Association of Machinists and Aerospace Workers District 142, and International Association of Machinists and Aerospace Workers Local 1650:

Messrs. Jolley, Walsh,
Gordon and Staab
606 Argyle Building
306 E. 12th Street
Kansas City, Missouri
By Mr. Michael D. Gordon

* * *

[3] LARRY GLENN HARDISON,

of lawful age, being produced, sworn and examined on behalf of Defendant TWA deposeth and saith:

Direct Examination by Mr. Mollenkamp

* * *

[23] Q. I believe that is enough. A. Okay.

Q. What holidays other than the Sabbath are celebrated by your church? A. The first day of Days of Unleavened Bread, and the last day.

Q. Does that fall on a certain calendar day within the month? A. No, sir, it is a movable date.

Q. Between what months? A. Usually between April and May. It can be as early as March, and the one following those two days.

Q. Before we get to that, do you recall when that day fell in 1968? A. No, sir.

Q. Do you remember when it fell in 1969? A. April the 3rd.

Mr. Gordon: Which one are we talking about, 1969?

Mr. Mollenkamp: Yes.

A. That is when I was discharged, yes.

Q. So, the day after your discharge, there was this holiday, the name of which appears in the record, the First Day of Unleavened Bread, and the last is one day? A. The First Day of Unleavened Bread and the Last Day of Unleavened Bread are separate dates.

Mr. Gordon: One occurred on April 3rd?

* * *

[29] Q. Has there ever been a Sabbath Day on which you have performed work since September of 1968? A. Since I was into the church fully, no.

Q. I am not sure that I understand what you mean by "into the church fully", will you explain that? A.

In September of '68, as I have said, I was coming into the faith. I don't recall if there were any Sabbath Days in September that I did work. I believe there were, but that is because I was not completely convinced about the Sabbath and secondly, I know that I transferred to the twilight shift to get away from full time work.

Q. So you believe you did work on a Sabbath Day in one or more occasions in September of 1968? A. It is quite possible, yes.

Q. Have you ever worked on any other Sabbath Days other than in September of 1968? A. None.

Q. Is it possible by applying to your minister or some other official within the church to be exempted in such a way that you can work on a Sabbath Day? A. There are no exemptions.

Q. Not even under emergency circumstances of some type? A. As far as regular work, no.

* * *

[55] Q. Let's see, to go back for a moment, when you started your employment with TWA, you started as a Stores Clerk in Building 1, is that correct? A. Yes, sir.

Q. How long did you work in Building 1? A. Well, I started in the Receiving Department and then I transferred to stockroom, so I was there, oh, about let's see, I started in '67, until about the end of '68.

Q. What kind of work was done in Building 1 in the Stores Department? A. In Stores, well, at the time the Receiving Department had a temporary setup there because of construction in Building 2. The company material was shipped from Building 1. There was Progress Department, which of course, moves material from one shop to another shop or one stockroom to another stockroom, and then there are other stockrooms of various types and natures.

Q. You say materials, you mean aircraft parts? A. Yes, sir.

Q. Are these parts used in the maintenance of TWA's airplanes? A. Yes, sir.

Q. Is the Stores Department open seven days a week? A. There are Stores Clerks there seven days a week, yes.

Q. So that this supply of aircraft parts is something that [56] is done seven days a week? A. Yes, sir.

Q. And there are three shifts per day, is that correct? A. That is correct.

Q. So that it is also a 24-hour a day activity? A. Yes.

Q. And to your knowledge, is this Stores Department open all year around? A. Yes, sir.

Q. So that there is always some person in the Stores Department who is available at any hour any day in the year for the purpose of supplying aircraft parts for maintaining aircraft? A. Yes, sir.

Q. Now, what was your specific job in Building 1? A. Well, to start, I was receiving on the what is called, Rimat Red Line, or company material coming in from the field, and then I transferred to the stockroom in Building 1 and was assigned to the stockroom at Bay 6 and also at the Radial and Hydraulic Parts Stockroom.

Q. Is there any on-the-job training in connection with those jobs? A. Yes, sir.

Q. Will you describe what that training is? A. Well, to start from hiring, TWA has formal classroom training [57] for half a day for a week, and then has you on the job in the various departments, stockroom, receiving, shipping for a week, and then you are assigned to a definite department, such as Receiving-Shipping Stockroom or whatever the case, and then, of course, you learn this specific job itself, the stock classes involved or the various shops you have to go to or whatever.

Q. How many other people in Stores held the same job that you held in December of '69 before you transferred to Building 2? A. In Receiving, oh, in Stockroom, I am sorry. I would estimate 20 just in Building 1.

Q. Did they all work on the same shift or were they assigned among different shifts? A. They were assigned among different shifts.

Q. How many would be on duty in different shifts? A. Let me correct it, 20 per shift. There would be, say, 40, 50 people and say 20 for the two main shifts.

Q. Can you describe the seniority grouping within Building 1 Stores Department, are all members of Stores in Building 1 part of the same seniority grouping? A. No. Well, there is the main seniority grouping that covers everybody in Stores and within your classification such as stockroom and Progress Department, various things like that, there is more minute breakdown.

[58] Q. Do you recall how many were in your seniority grouping in December of '68? A. No, sir, I don't.

Q. Do you recall what your relative seniority was within the grouping? A. I was about halfway up from the bottom, I think.

Q. With this seniority did this enable you to get days off which included your Sabbath? A. Yes, sir.

Q. So that between the time that you came into the faith in September of '68 until sometime in December of '68 when you transferred out of Building 1, your seniority enabled you to have days off which you included your Sabbath? A. Yes, sir.

Q. Now, why did you transfer to Building 2? A. Well, I was married and I was on the graveyard shift in Building 1, and at the time I could have held the day shift in Building 2 with my seniority and being as day shift is more of a convenient time when you are married, I transferred.

Q. Isn't it true that Building 2 had a different seniority grouping than Building 1? A. Yes.

Q. So that by transferring to Building 2, you gave up seniority you had in Building 1 and you fell within new [59] seniority grouping in Building 2? A. Yes, new grouping, yes.

Q. Was your seniority lower in Building 2 than in Building 1? A. Yes.

Q. What was your seniority in Building 2? A. I think I started out third from bottom and ended up second from bottom.

Q. When, you say "ended up second from bottom", that would be in March of '69. Apparently prior to then a junior man had resigned so there was only one man junior to you within the Stores Department in Building 2? A. Yes, sir.

Q. Now didn't this give you some cause for concern as it affected your ability to get days off for Sabbath observance? A. No, sir.

Q. Well, going into a job where you have less seniority, isn't it true that you can anticipate junior people having vacation shifts or being unable to attend work that might require your having to work in their place? A. Yes.

Q. And being second from the bottom of the seniority list did not trouble you in that respect? A. No, sir.

Q. Isn't that what happened in March of '69, that the junior [60] man went on vacation and that necessitated your working in his place? A. That is right.

Q. And to work in his place, you would not have had days off on your Sabbath? A. That is correct.

Q. So it turned out to be a problem? A. Yes, sir.

Q. Isn't it true that in general the more senior employees do not prefer to work on week ends, namely Saturdays and Sundays? A. Yes, sir.

Q. So that being junior in the department, you might expect some Saturday and Sunday assignments? A. I could have.

Q. But you transferred into Building 2 in any event, so that you could get the day shift in preference to night shift or twilight shift in Building 1? A. I was on graveyard, yes, I did transfer to get the day shift.

Q. Now, in a case such as the one we referred to where the junior man went on vacation, do you know whether the company can require an employee more senior than you in your seniority at that time, to fill the position of the junior man on vacation without first determining your availability [61] to fill that position? A. Let me see if I have got the question straight. Do I know if the company could require someone of higher seniority than I to fill my position if I had to work, that is basically the question, or have I left out something?

Q. Perhaps the Court Reporter should read back the question.

(The question was read by the Court Reporter.)

A. No, I don't.

Q. (By Mr. Mollenkamp) Well, in other words, can the company take a man out of seniority and require him to work in place of a junior man such as yourself in this incident?

Mr. Pickett: I don't want to unduly interrupt. I object to the question being unduly redundant, repetition. He has answered the question.

A. According to seniority system, they can't require anybody above me to work.

Q. (By Mr. Mollenkamp) How, in fact, are job assignments made, aren't they made through the Union steward? A. The specific job assignment or you mean to go from one classification to another?

Q. Let me rephrase the question, if I may, for clarification. Isn't it true that the Union steward has the seniority list and it is the Union steward who determines who fills a certain job in case of vacancy, by referring to that seniority list? [62] A. Yes, I believe it is.

Q. How many other people in Building 2 had the same job description that you had in March of 1969? A. You mean just the title Stores Clerk, is that what you mean or the specific job I was doing?

Q. Let's take both. Let's take Stores Clerk first. A. Okay, as Stores Clerk in Building 2, there were approximately 150 men. As my particular job, the specific function that I did, I was the only one.

Q. What was that specific job? A. Well, what we call it was a trainman where I stopped at every shop and transferred material.

Q. What training did you receive for that job? A. The same that I had outlined before, you know, when first hired I went through the Stores Clerk class and received on-the-job training as far as operating equipment goes and all of that, and then the man that I replaced showed me where all of the shops were and told me my basic duties.

Q. Now, when you were asked to fill in for the man on vacation in March of 1969, what kind of work would that have been? A. Well, he worked a specific shop such as machine shop and just delivered their materials and brought them supplies and on the weekend, I think he just handled the stockroom, the tool stockroom.

* * *

[64] Q. Directing your attention to Paragraph No. 9 of the attachment, it indicates that you had discussions centering around transferring you to a shift or other group assignment where you would not be required to work on a Sabbath Day, is that correct? A. Yes, sir.

Q. And with whom were those discussions? A. That is that same discussion I had spoken of about talking to Mr. Kussman and Mr. Tinder.

Q. And you further indicated in this attachment that even suggestions acceptable to the employer TWA or to yourself were vetoed by the Union Steward, is that correct? A. Yes, sir.

Q. Will you describe what those suggestions were, please? A. One was a suggestion of just changing shifts where I was willing to go on graveyard shift. I had talked to the man that was on graveyard and he was unhappy about it. I suggested to Mr. Kussman about a transfer there if he was willing, and the Union would go along with it. Mr. Tinder said, "No, you can forget about that," regardless of whether he was willing to go or not, unless I could bid it. He had higher seniority than I, so I could not bid it.

Q. Was that suggestion acceptable to Mr. Kussman? A. Yes, sir. To continue, I suggested to Mr. Kussman a transfer back to Building 1 where I had come from, stockroom [65] or whatever I could get in at the time would be acceptable to me because I was planning on bidding back in anyway, as soon as my time elapsed from my last bid until I was available for another. The Union said I would have to await my time. When the time would be up, I was fired.

Q. Before your employment was terminated, was that suggestion that you have just related acceptable to Mr. Kussman? A. He said he thought it could be worked out. He did not say "yes" or "no", but he thought maybe that could be worked out, but Mr. Tinder said, no, I would have to wait my time.

Q. These conversations were held in March of '69, is that correct? A. Yes, sir.

Mr. Mollenkamp: I think that is all of the questions I have.

Cross-Examination by Mr. Gordon

* * *

[80] Q. Do you feel that I would be violating God's—strike that. Do you feel that other employees at TWA, if they [81] worked on weekends would be violating God's Commandments? A. Other TWA employees?

Q. Who do not belong to the World Church of God? A. It is Sabbath Day. If they work on it, they are violating it.

Q. Do you have objections to other employees filling your place? A. No, they can if they want to.

Q. I think you told Mr. Mollenkamp about a conversation you had with Mr. Kussman in September of 1968. A. Yes, it was late September.

Q. And in that discussion you told him you were coming into the church or something to that effect? A. Yes, I told him that I was studying the Bible and that I believed that there would be a problem concerning the Sabbath Day, and I would like to work with the company and try to get it solved.

Q. Was the Union present when this conversation took place? A. Yes, sir.

Q. Did it make any objection to anything that was said in that discussion? A. Just stipulated that it had to be through the seniority system.

Q. Who was present? A. Jim Tinder.

[82] Q. Was this the first notification that the Union had that you were becoming interested in this religion? A. I think I talked to Jim prior to my going down to see Mr. Kussman, but not positive.

Q. Approximately the same day or shortly before? A. Shortly before.

Q. Do you recall anything that you said to him or he said to you in that conversation? A. No, I think

I was informing him that I would be trying to get this appointment.

Q. Did he or anyone else from the Union tell you they had anything against you joining this new religion? A. No.

Q. So you had a conversation—I am skipping back and forth—you had a conversation with Mr. Kussman and Mr. Tinder sometime in September of 1968? A. Yes.

Q. And during that conversation Mr. Kussman told you that he would give you an excuse for your holidays? A. Yes, sir.

Q. The Union raised no objection to that procedure? A. No objection.

* * *

[85] Q. It is my understanding that this is the only time outside [86] of September 1968, that the Union had been present when your particular religion problem was discussed? A. Yes.

Q. We are up to a day or two, I assume, prior to March 8, 1969. Just tell me what was said in that conversation. A. Well, I got down there and—

Q. Where was there? A. In Mr. Kussman's office.

Q. Who called the meeting? A. Mr. Kussman did.

Q. Do you know why, was it because he heard you had the problem? A. He apparently saw the schedule change and wanted to talk to me about it because this is pretty much what he said when he talked to me.

Q. Tell me what everyone said, to the best of your recollection. A. He said—

Q. Mr. Kussman. A. Mr. Kussman said he saw I was scheduled to work on Saturday because of vacation scheduling and that because of our previous discussion that he wanted to see if we could not work out a solution, and I said, "That is fine with me. I am willing to go along with anything that is reasonable," so I told him

that if nothing else I would [87] be glad to take the time off and not be paid for it, but he said, "Well, how about changing shifts?" I said, "That is okay with me," and then, as I previously said, I told him of the man on the graveyard shift who disliked the shift and I suggested that maybe we could make a transfer there and not have any paper work go back and forth or any other problems, just swap people, and Mr. Tinder said no, it would have to go through the regular procedures and that the only way I could do was bid into it, and as I previously stated, this man had more seniority than I, so I could not bump him out of position. I suggested a transfer to different grouping, preferably back to Building 1. Most anywhere would be acceptable. Mr. Tinder brought up my time had not elapsed from my last bid until I could bid again, and therefore, I would have to wait until my time had elapsed so I could put in a bid to get out of my situation. I told him, "I am sorry but I can't be here on the Sabbath. If we can't work out something like that, I can't work," and that is basically the whole conversation.

Q. Did Mr. Tinder discuss with you the possibility of you taking time off and not being paid? A. I brought it up. I said, "I will be glad to take the time off. I don't want my pay if I can have the time off, that will be good enough." Mr. Kussman could not allow [88] that.

Q. What was Mr. Tinder's reaction to that proposal? A. As far as I know, he was acceptable to that.

Q. And I think you mentioned the fact that your time had not elapsed from your last bid, so Mr. Tinder said it would have to elapse under his interpretation of the Constitution until you would be eligible to rebid? A. Yes.

Q. How much time did you have to go? A. I think it was a month or two. I think there is a six months' period between a group change like I had made from stockroom to, you know, Building 2 Progress. I think it is six months and I had two or three months yet to go.

Q. Did Mr. Tinder express any objection once you waited that period to allow you to transfer to different grouping after your time elapsed? A. No objection.

Q. Did he make any suggestions to you about what you might do in the meantime until your lapsed time had run out? A. No, sir.

Q. Would it be fair to say at this meeting with Mr. Kussman, Mr. Stewart and Mr. Tinder, that the Union had no objection to your taking the time off without pay, if that is [89] what you wished to do, but objected to your changing shifts or transferring to different groups because under their interpretation of the contract it was not permissible? A. That is correct.

Q. Actually I probably misspoke. I suppose it would be fair to say the Union had no objection to you changing shifts if you were the most senior man on the bid? A. If I could bid into something else, that would be correct, but there was nothing I could bid into.

Q. Were the jobs up for bid? A. No, there were no jobs up was one problem. There was no jobs up for bidding to start with, and secondly, I did not have the seniority to bid them.

Q. When you talk about transferring to a change of shift? A. Yes.

Q. I am just confused as to how Mr. Kussman could have suggested that if there was not a job opening. A. Well, like I said, you know, we were just going to swap if the guy was willing to transfer willingly to vacate his

position, and they would put me in his just to make a swap and all without having an official opening.

Q. In other words, what was really discussed on changing shifts was a swap with you and some other fellow? A. Right.

* * *

[91] Q. At the higher levels within the grievance procedure and [92] within the union itself there were numerous people at the Plant that had more authority than Mr. Tinder? A. The Grievance Committee did.

Q. Do you know anybody in the Grievance Committee that worked in close proximity to you? A. None.

Q. Do you know where the Grievance Committee was, if you wanted to talk to them? A. I never had any use for them.

Q. Do you know where they were? A. Yes.

Q. When did you find out? A. Prior to my leaving.

Q. Did you know how to get ahold of the Grievance Committee or Union official? A. Yes.

Q. The office is in the Plant, it is not a big secret how to get ahold of the Union? A. I guess not.

Q. I believe that was about it for the discussion that happened with Mr. Kussman and your Supervisor, John Nicholson, and immediately thereafter March 8 happened and you called in and told them you wanted the day off for personal business? A. Yes.

* * *

[107] Q. Did they ever object to your taking off a day without pay? [108] A. No, sir.

Q. So it would not be overruling the Union by instructing supervisors to allow you to take the Sabbath Day off or leave early because the Union never asked for that to begin with. A. That is not what I mean by overruling was to allow a shift change or something.

Q. The company could have allowed you a shift change without the permission of the Union, couldn't they? A. I thought they could.

Q. The company could have found in your favor at the discharge hearing if it wanted to, couldn't it? A. As best I thought they could.

Q. And the company could have rehired you subsequently without the Union? A. Yes.

Q. In fact, the Union has no effect at all, to your knowledge, on the company's hiring practices, does it? A. General hiring practices, no. On this I have no idea.

Q. You have no reason to believe the Union tried to influence the company not to rehire you at the later time? A. No.

Q. I think you told Mr. Mollenkamp about an incident, I am not sure exactly when it occurred, I don't think we have talked about in which it was suggested that you call in [109] sick on certain Saturdays, do you recall that incident? A. Yes.

* * *

[110] Q. Do you know of any other members of the church who work for TWA beside Mr. Malden? [111] A. Yes.

Q. Who are they? A. One pilot.

Q. What is his name? A. William Cordell.

Q. Does he work on what you regard as the Sabbath? A. No, sir.

Q. Do you know why or why not? A. No, I know why he does not.

Q. That is not a good question. We will forget it. Of course, pilots are covered by different bargaining contracts than you were. A. Yes.

Q. Outside of the contact that you have had with unions that you described to me and Mr. Mollenkamp,

are you familiar with how union contracts work or what seniority protection they give? A. Yes, I believe so.

Q. Have you ever discussed seniority protections with other employees at TWA? A. Not that I recall.

Q. If you know, would it be fair to say that some union members regard their seniority rights in the contract almost as preciously as you regard your religious beliefs? A. Yes.

[112] Q. And if you were allowed to bump out of seniority either to transfer shifts or to bid on a job under the contract you were not entitled to, it would almost necessarily mean that an individual who did not share your religious belief would be deprived of rights he assumed he was entitled to under bargaining agreement.

Mr. Pickett: I object to the form of the question, calling for legal conclusion based on no foundation. Mr. Hardison has his interpretations of the Constitution of the United States and any collective bargaining agreement or any contract.

Q. (By Mr. Gordon) This suit is not based on the Constitution, is it?

Mr. Pickett: Right. They are protected by Title Seven.

Mr. Gordon: If this thing is based on tying on the suit of Title Seven, I would like to know.

Mr. Pickett: It is based on Title 7 and 14 amended, supersedes all collective bargaining agreements you are trying to bring up at this time.

Mr. Gordon: Read the question.

(The question was read by the reporter.)

A. If I was allowed to bump out of slot, yes.

* * *

[114] Q. Did any Union official, to your knowledge, ever object to working out a solution, if that solution

did not violate the terms of the collective bargaining agreement? A. Not that I know of.

Q. And there were some discussions made where the Union indicated that there were possible solutions that could be made outside of the literal terms of the collective bargaining agreement, for example, allowing you to find a substitute or allowing you to take a day off without pay or allowing you to leave the job early? A. The Union was willing to allow me to take a day off without pay or to leave early, but so far as a substitute, no way.

Q. By "substitute" I don't mean a switch, just a man to come in and fill your job. They object to that also? A. Yes, sir.

Mr. Mollenkamp: Did the company object to that?

A. I don't recall.

Q. Did the company object to your taking the day off without pay, for example? A. Yes, to the point that if I was required to work, I was supposed to be there.

TRANSCRIPT OF PROCEDINGS

[202] EVERETT HERBERT KUSSMANN,

called as a witness on behalf of Defendant TWA, was duly sworn and testified as follows:

Direct Examination by Mr. Mollenkamp

* * *

[204] Q. What is the work of the Stores Department at the Kansas City Overhaul Base? A. Our responsibility involves the housing, retaining and availability of all parts at the Kansas City location to be available for use there and on its system through its structure and to transport, move parts within the industrial complex, that is, the

Overhaul Base, to transport and truck parts and other supplies in the Kansas City area.

Q. Is there any obligation of the Stores Department to supply airline needs in the event of emergency? A. Yes, sir, very definitely.

Q. Would you explain what that is? A. The basic requirements on the domestic system are funneled into what we call the Stores Co-ordinator at MCI, and they are interpreted and transmitted to the stock room area and the parts are obtained, if possible, and forwarded to the point of need. If it is not possible, the need is transmitted to the shop who produces the need, or if that is not possible we obtain from other field sources or direct the need to Purchasing if that is not first possible.

Q. What are the hours of the Stores Department? A. 24 hours a day, 7 days a week, every week of the year.

Q. And why is that necessary? [205] A. Because that is the schedule that the company operates its scheduled operation.

The Court: It is true generally of every spot, is it not, Mr. Kussmann?

The Witness: Yes.

The Court: And you are speaking of KCI, this is actually the Overhaul Base where your responsibility for not only of TWA contract but also under contract with other airlines that are brought in.

The Witness: This is true.

The Court: You may continue.

Q. (By Mr. Mollenkamp) Do you know how many other airlines we have contracts with for repair, maintenance and overhaul? A. No, I couldn't tell you exactly, offhand, but it is considerable, and then we have parts interchange agreements with many airlines, both foreign and domestic.

Q. When is the first time that you became aware that Mr. Hardison was employed in the Stores Department? A. Well, generally at the time of his employment in, I think, June of 1967.

Q. Mr. Kussmann, I show you what has been marked Plaintiff's Exhibit 1 and ask you if you recognize that document. A. Yes, this was the document that I received.

Q. And is this addressed to you from Mr. Hardison? [206] A. Yes it is.

Q. And it is dated April 25, 1968. A. Yes, sir, it is.

Q. Do you recall any conversations arising out of this document? A. Yes, the general conversation was related to the fact that he had taken on some religious change in his life and that he was going to be confronted with a difference in what we consider the contractual holidays related to his religious obligations and also that there would be some obligation related to what he defined as the Sabbath.

Q. Mr. Kussmann, I show you what has been marked Plaintiff's Exhibit 15, and ask you if you recognize that. A. Yes, it is a memo form that I sent to Mr. A. W. Nelson, who was in charge of the group that he worked in, and asked for him to arrange to meet with me and with his steward as soon as possible.

The Court: Let me refresh my recollection on 15, please.

Now, I missed your testimony as to S.A.P.

The Witness: As soon as possible.

The Court: Thank you, and what is the date of that memo?

The Witness: The memo is not dated, Your Honor, [207] but it was attached to this (indicating).

The Court: Attached to the first letter where there was written evidence of his interest in religion?

The Witness: Yes sir.

The Court: All right, so 1 and 15 are tied together. You requested Mr. Nelson to meet with you and Mr. Hardison as soon as possible.

The Witness: Not from Mr. Nelson, but for Mr. Nelson to arrange for Mr. Hardison and his steward to meet with me.

The Court: All right, thank you.

Q. (By Mr. Mollenkamp) I show you what has been marked Plaintiff's Exhibit 14 and ask you if you recognize that. A. This was from Art Nelson, A. W. Nelson, to Ralph, which would be Ralph Shields, Supervisor on his shift, to see him related to the two attached pieces of paper, documents.

Q. And just for clarification, Ralph Shields is not the same person as Roger Shields. A. No.

Q. Would you tell us who Ralph Shields is? A. If I recall correctly, he was the supervisor, Chief, Progress, on that shift at that time.

Q. And who is Roger Shields? [208] A. Roger Shields is Manager of Industrial Relations works for Mr. Stone.

Q. And the date of this memo is April 29, 1968. A. Right.

Q. Now, a moment ago you were relating a conversation that took place. Who was present at that conversation? A. Well, it is a recollection, and where it asked for the steward to be present I would assume that there was a steward present, but I do not recall who he was or if he was.

Q. Who else was present? A. Mr. Hardison.

Q. Anyone else? A. Not that I recall.

Q. I show you what has been marked Plaintiff's Exhibit 16 and ask you if you recognize that document. A. Yes, this is a memo that I forwarded to Mr. Burns Prater

resulting from the meeting that I had in which I outlined that I had agreed to Steward seeking days off.

Q. Let's take these step by step. Referring to Plaintiff's Exhibit 16, which is a memo from yourself to Burns Prater, dated May 31, tell us who Burns Prater is. A. Burns Prater at that time was the Industrial Relations Representative that related as to the Stores Department.

Q. And to put these people in the right departments, did [209] Mr. Prater at that time report to Mr. Wilbur Stone? A. He reported to the Director of Industrial Relations. I believe Mr. Stone was there at that time.

Q. Is Roger Shields also in Mr. Stone's department? A. Yes, he is.

Q. And was at that time? A. Yes, he was.

Q. Now, read Item 1 on that memo, please. A. "Agreed to Steward seeking swap or days off."

Q. Can you elaborate on that? A. This says that I agreed that Steward would seek someone to exchange days off with Hardison.

Q. And you were agreeable to that as a solution, is that correct? A. That is correct.

Q. Was that ever implemented; in other words, was there ever a swap at that point in time? A. I do not recall.

Q. Well, if there was no swap, do you have any reason why there might not have been?

Mr. Gordon: I will have to object to that. It seems to me speculation based on something that isn't even in the record.

The Court: The objection will be overruled.

A. Will you restate it?

[210] (Whereupon, the pending question was read by the reporter.)

A. No, I do not.

Q. The second item, would you read that, please? A. "Agreed to odd holidays (excused T.O.)," which would be time off, "if he works the Christian holidays when requested."

Q. Can you tell me why it is that TWA is able to offer time off on specific religious holidays? I should put that in the past tense. Why was it in Mr. Hardison's case that TWA was able to offer time off to him on specific religious holidays? A. Well, in the discussion on the holidays that he was relating to, they were not the same holidays that are what we consider the contractual provided holidays, and there would be in the main a large number of the work force there, and if he would agree—and I am certain that I outlined to him that I couldn't tell him that he would work those holidays, because it would be if he were asked in keeping with his seniority, but that it would afford people who normally would want the contractual provided holidays specified off, if he would be willing to work and allow another man to enjoy those holidays.

Q. Is the same consideration true when you are talking about permitting an employee to have a weekend off for Sabbath [211] observance? A. No, it is not, because we work a minimal number of employees on a holiday—I'm sorry, on a weekend, and therefore there is not the available manpower that there is through the week, normal workdays.

The Court: I'm sorry, I didn't get that. Is your weekend lighter employment than weekday?

The Witness: Very much so, Your Honor. In the case in the Progress, Building 2, I think the record will indicate probably 40 employees total and not over 3 of them at that time were working on the weekend.

The Court: This might be in contrast with actually the flying force, because you actually might have more weekends, would you not?

The Witness: No, it would be in keeping with the area he was working with the force, the mechanical force that he was working with, that people and people like him would be supplying parts to.

The Court: And I would assume your major overhaul staff, you try to schedule to commence Monday with a full crew if you can?

The Witness: This is true.

* * *

[213] Q. (By Mr. Mollenkamp) Will you read the third item from Plaintiff's Exhibit 16? A. "He advised that you are getting him another job. Agreed you should."

Q. Will you elaborate on that statement, please? A. Yes, I also had some discussion with Burns on this. This was generated by the fact that Mr. Hardison told me that he had had some conversation with Burns Prater in which Burns had told him that he would try to find him a position in some other area of the company, which I took it to mean, and Burns also later related, something like Production Control or Work Control, or other noncontract related positions where it would be a Monday through Friday normal work situation that would not require the working of this period. We had conversations related to the fact that in these areas there were also requirements for this type of work on occasion and he had not been successful in finding another position for him.

Q. Would you read the final un-numbered sentence on Plaintiff's Exhibit 16? A. "Says belongs to the 'Worldwide Christian Church,'" and "Worldwide Christian Church" is in quotes. "Garner Ted Armstrong, Ambassador College, Pasadena, California."

Q. Is that your handwriting? A. Yes, sir.

[214] Q. Did you write that after some investigation into Mr. Hardison's religious beliefs? A. No, he had

related to me that that is what he had or was becoming involved in and through some of the conversation, why, the association, I believe, with the radio program, which I have heard on occasion, caused me to understand what he was talking about a little better and I put that down as a matter of memo, or note.

Q. Did you have any reason to be concerned about what Mr. Hardison's religious convictions were? A. No, I had no concern about his religious convictions. I had some concern about what was involved in the days off that we were talking about, and were seeking some way to find an equitable solution, and in the discussion related to the Sabbath as he was relating his obligations to it from Sundown Friday to Sundown Saturday. It was acknowledged that there was some problem possibilities in this and that the contractual responsibilities I had related to coverage for specific requirements of service could be affected. If I recall correctly, he told me he thought he could work those out in the framework of the seniority system.

Q. I show you what has been marked Plaintiff's Exhibit 17 and ask you if you recognize that. A. Yes, this is a memo from Burns Prater to myself on [215] 5-7-68, which said that he had not made any headway, since his time off and days off requirements are too difficult to handle. I understand no one would swap days off with him.

Q. Do you know what is behind that memo? A. The only thing that I know of that is behind this memo, and I don't know whether the discussion was prior to or subsequent to the memo, was the fact that he had not been able to obtain a different position for him.

Q. Do you understand the time off problem which is referred to in this memo to refer to Sabbath observances? A. Well, I don't know whether they would

restrict it to the Sabbath or whether the additional religious holidays would be involved. That I do not know.

Q. To your knowledge, between April 25 of 1968 and October 4 of 1968, was there any other correspondence or communication about Mr. Hardison's religious beliefs? A. From April until—

Q. Well, April 25, 1968 was the date of the first communication, I believe, that you received from Mr. Hardison. The next exhibit that I am going to show you, Plaintiff's Exhibit No. 2, is a letter or memo consisting of two pages, from Mr. Haridson to yourself, and dated October 4, 1968. Now, is that the next communication in order of the exhibits that I have shown, to the best of your [216] knowledge? A. I believe this is correct.

Q. Was there any time, to your knowledge, when during that period of time, between April and October, that Mr. Haridson specifically requested to have a certain Sabbath day off or religious holiday off? A. Not to my knowledge.

* * *

[218] Q. Now, in response to that October 4, 1968, letter, did you write the letter which is Plaintiff's Exhibit 3? A. Yes, I did.

Q. And what did you agree to in that letter? A. Well, I acknowledged receipt of his letter and the previous discussion relating to his religious involvement, his holidays and also the discussion we had had pertaining to his working the contract specified holidays. I also outlined to him that he would recognize that I would not always be able to comply for reasons byond my control.

Q. What did you have reference to there? A. Well, I had to have coverage and it would not be feasible where I wouldn't have adequate coverage, then I would not be able to do this.

Q. When you say coverage, what are you referring to? A. Well, if you've got a minimal shift coverage like on Saturday or Sunday and something like this was involved, then I might not be able to make it. I also asked him for a list of the holidays that would be involved.

Q. And did he furnish such a list by his letter of October 20, which is Plaintiff's Exhibit 4? [219] A. Yes, he did.

Q. Now, what is the date of the first holiday that appears on that list? A. April 3.

Q. And he furnished this to you in October of 1968, October 20, to be exact? A. Correct.

Q. So that none of these holidays actually came up prior to the discharge, which I believe was April 2 of 1969 is that correct? A. That is correct.

Q. I will show you an exhibit which has been marked Plaintiff's Exhibit 6, which is a letter from Mr. Butcher to Mr. Hardison, dated March 21, 1969, and ask if you received a copy of that. A. Yes, I did.

Q. Did you review that letter before it was sent to Mr. Hardison? A. A letter of this nature would be reviewed by me before it was sent. Yes, I did.

The Court: The question was not whether it regularly did, Mr. Kussman. Could you recall specifically whether you reviewed that particular letter?

The Witness: I reviewed this particular letter before it was sent, Your Honor.

[220] The Court: I am not suggesting you didn't, but I would like, if I could, your personal knowledge about it, which you indicated you do have.

The Witness: Yes, sir.

Q. (By Mr. Mollenkamp) Now, what were the events that precipitated this letter, briefly? A. Well, he had not come to work on two consecutive days, being Saturdays, that he had been scheduled to work, and he

had been advised that it was necessary for him to work because of coverage requirements.

Q. Would you indicate what the coverage requirements were on March 8 of 1969, and March 15 of 1969? A. Well, he was the only man on that shift and therefore he was the only person that was available in that section to service the needs of the mechanics that were working in that area.

Q. Specifically what work would that be? A. It would be the moving of parts from one working area to another. It would be the obtaining of parts, and at this time also furnishing parts from the tool room.

Q. And what would be the consequence if those parts were not moved? A. Well, there would be mechanics that wouldn't have units to work. There might be requirements for A.O.G., Aircraft on the Ground, to be supplied by the Wire Desk, [221] and that would be called for from the shop. The general progress responsibility that our people afford to the total work and obligation of the workforce would fall upon this man in that area.

Q. Now, I believe you have testified, and in fact it is stipulated, that Mr. Hardison did not in fact show on March 8, 1969, and March 15, 1969, and the 22nd. What was done to meet the requirements resulting from his absence on those days? A. Well, when we have someone that doesn't show up, we have no other alternative but to go to what we consider emergency measures and move someone from another seniority work section to cover the need that we deem to be the greatest, and this in turn causes us to give reduced service or coverage or work effort in an area where it is scheduled.

Q. Is there any other way of handling that requirement? A. Another way is overtime, which would be on a semi-emergency basis, if the individual scheduled didn't show. It would be to hold someone over from

the previous shift if they were available or to call someone in early or to call someone in on a day off, which would leave you uncovered for awhile if you didn't have anybody.

Q. Is such overtime at a premium rate of pay? A. That is correct.

[222] Q. What is that? A. If it was the first day it would be time and a half. If it was the second day it would be double time.

Q. Now, I believe that prior to March 8 you initiated a meeting with Mr. Hardison about this problem, is that correct? A. That is correct.

Q. Can you tell us what was discussed at that meeting? A. We discussed the fact that he was in a position where he was going to have to cover his shift that I knew to be that which he had outlined to be Sabbath and that he was assigned to that and that I wanted to make sure we had no misunderstanding on it.

The Court: When was this meeting?

The Witness: Oh, possibly a week before—I think it is a matter—

Mr. Pickett: I believe it is stipulated to as being March 6th, Your Honor.

The Witness: Thank you.

The Court: That would be subsequent to the Butcher letter.

The Witness: Yes.

Mr. Mollenkamp: No, Your Honor. I'm sorry, I sort of had my questions out of chronology. The Butcher letter actually came after the meeting.

* * *

[225] Q. (By Mr. Mollenkamp) When a weekend job becomes vacant in a Stores Section at Kansas City Overhaul Base, how is that vacancy normally filled? A. If it is a vacancy within the seniority, or section, now seniority grouping, it would be given to the steward to

fill it in the seniority considerations. If it is an addition to the group resulting from a bid-in, or whether it was a reduction in force, or bidding-out, it also would be referred to the Stores for aligning according to seniority exercise.

Q. Now, returning to the meeting of March 6, 1969, who was present at that meeting? A. Well, Mr. Hardison and Mr. Tinder and myself, and I don't recall whether Mr. Butcher was there or not.

Q. Did you make any suggestions as to the way in which Mr. Hardison's religious needs might be met? A. Yes, I did.

Q. What were those suggestions? A. Well, I suggested that they could be by exchanging with an employee within the section or seniority grouping or that he might be able to exercise or exchange with [226] someone in another seniority grouping.

Q. And was the company willing to abide by these suggestions? A. Yes.

The Court: Why were these suggestions not implemented?

The Witness: I do not know.

Q. Did Mr. Tinder refuse those suggestions? A. I don't recall that Mr. Tinder refused the suggestions there, or whether or not he indicated that he would go out and see. I do not recall.

Q. Would those suggestions require Union approval? A. Yes, they would, they would affect seniority.

Q. And if the Union had approved those suggestions would the swap or trade have been made? A. Yes, if they could find someone who would do this, I would have been agreeable to it and had indicated it.

Q. In that same meeting you indicated, I believe, that you were not agreeable to time off for Mr. Hardison, is that right? A. That is right.

Q. Why is that? A. Well, I can only depend, then, on the work force that is there, and if I agree to his time off and I am usurping seniority in another section that would have to cover, which would indicate that I had more weekend manpower [227] than I required, which was not true, or I would have to depend on overtime, which could not be compulsory in this case, and I might not get it.

Q. Was your refusal to give Mr. Hardison time off on Saturdays in March of 1969 motivated in any way by his religious convictions? A. Definitely not. I respected the man's religious convictions, and I do today.

Q. Are you a religious man yourself? A. I am.

Q. What is your faith? A. I belong to the Christian Church, the Disciples of Christ. I serve in my local church as an elder. I serve in the Kansas City area as Third Vice-President of the Christian Church Commission. I serve on the General Board of the Christian Church in its national work, and I serve on the Administrative Committee of the General Board, and until this year have served on the Executive Committee of the Administrative Committee, which is the group that administers the affairs of the church when the administrative committee is not in session.

Q. I show you Plaintiff's Exhibit 8 and ask you if you recognize that document. A. Yes, I have seen this document.

Q. Who is A. L. Juengling? [228] A. He was a Chief Ships Storekeeper.

Q. And whose initials are those at the bottom? A. They are Arch Juengling's, A. L. Juengling's.

The Court: Gentlemen, you will have to keep your voices up.

The Witness: I'm sorry. They are A. L. Jeungling's.

Q. (By Mr. Mollenkamp) And can you relate briefly why this memo was written? A. This memo was sent to Mr. Butcher relating that Mr. Hardison and the Progress group on twilight had left at approximately 1830, which would be 6:30 in the evening, and he had told his lead clerk, Mr. Baumgartner, that he could not work from Sundown Friday to Sundown Saturday on account of religious reasons.

Q. Was that on or about March 28 of 1969? A. Yes, it was.

The Court: I take it that that is the memorandum with supporting data on the employment record that I saw last night. March 8 and March 15 said personal reasons. March 25 said religious reasons. Do you know whether that memorandum refused to make that notation?

Mr. Mollenkamp: Well, Your Honor, my understanding, your recitation of dates is not correct. He [229] missed three days, March 8, March 15, March 22, and then this was the subsequent Friday evening, of March 28, in which he clocked out early.

The Court: In other words, this is the fourth time?

Mr. Mollenkamp: Yes, sir.

The Court: That he made his witness as far as his Sabbath, and I don't know where the underlying data is. I did notice with some interest, because there was some affidavit, either E.E.O.C. or the Board of Procedures before the Missouri Human Rights Commission, that suggested that nobody knew why he took off any of the Saturday nights, a suggestion that was a little difficult for me to understand in light of all the documentation prior to that time, and then I notice that on the third Saturday there was actually a notation that this was based on religious grounds rather than personal reasons as stated the first two times. So I get this in sequence, this is

actually between the interval after he had been given notice of discharge and the time of actual taking effect.

Mr. Mollenkamp: Yes.

Mr. Pickett: Two statements for clarification. Number one, the documents referred to came out of TWA's personnel file and, secondly, Mr. Hardison bid again after missing the 8th, the 15th, and the 22nd on to a [230] twilight shift so that he was no longer working the entire weekend. There was a third shift, so the 28th he worked from 3 until 11, so therefore he checked out at 3 until Sundown. He worked 3 until Sundown and then checked out, and that is when this notation from Juengling and also reflected in the personnel file reflects that he checked out. He had a change in attempt to avoid the conflict of religion, hopefully so that he could check out early after working half of his shift anyway, and then work out some arrangement at a later date to make up for the difference. I don't believe the Court quite got the chronology.

* * *

[231] Q. Are you familiar with the Union Relief Committee? A. Yes, I am.

Q. Will you describe to the best of your understanding the operations of the Union Relief Committee? A. There is a little difference between being familiar with it and describing its operation. There are some men who are set aside as a Relief Committee that on occasion come in and relate to problems involving our employees and particular situations that are unusual that require special consideration.

Q. Do you know whether cases similar to Mr. Hardison's situation where the employee has resorted to the Union Relief Committee? A. You mean for religious reasons?

Q. Religious reasons or otherwise, any case of hardship that you can personally recall. A. Yes, there are cases that relate to health and family [232] involvements. We have one at the present time where an employee by the name of Libby has a problem with his wife, illness, and the Relief Committee made request that certain relief be given in this area, and it was granted.

Q. Do you recall whether resort to the Union Relief Committee was discussed in your meeting of March 6, 1969? A. I do not recall it being discussed.

Q. To your knowledge did Mr. Hardison ever seek relief from the Union Relief Committee? A. I have no knowledge that he did.

Q. To your knowledge did the Union ever resort to the Union Relief Committee in behalf of Mr. Hardison? A. I have no knowledge.

The Court: Do you know whether Mr. Hardison even knew who was on the Relief Committee and how it operated?

The Witness: No, Your Honor, I do not.

Q. (By Mr. Mollenkamp) In your opinion, is this one way his request for religious needs could have been accommodated?

Mr. Gordon: I object to what his opinion is.

The Court: Is that an objection?

Mr. Gordon: Yes, sir.

The Court: Overruled. You may answer.

A. I would have no way of knowing if they would accommodate him on that kind—

[233] Q. Is that committee administered by Union personnel? A. As far as I know, they are appointed by the Union. I have no knowledge of other appointments.

Q. And there is no provision for the Union Relief Committee under our collective bargaining agreement, is that correct? A. That is right.

* * *

[234] Q. (By Mr. Mollenkamp) Mr. Kussman, to your knowledge did plaintiff ever initiate a grievance prior to his discharge on or about March 8 or March 15 or March 22? A. Not to my knowledge.

Q. Or did the Union ever initiate a grievance on his behalf on or about that time? [235] A. Not to my knowledge.

Q. To your knowledge did either the plaintiff or the Union initiate an appeal from the discharge hearing? A. Not to my knowledge.

* * *

[246] EVERETT HERBERT KUSSMANN,

having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Pickett

* * *

[247] Q. But being you are supervisor, I am totally trying to get to what particular function did he have on the weekend on a reduced work force, and, if so, what was his function and to how many people did his function seem to hinge on?

* * *

[248] A. My statement was that he was part of a work force of approximately 38 to 40 people. He was, not what he serviced, and on the weekend it was by himself.

Q. All right, sir, during the week he is part of or individually a part of how big a work force? A. Well, the Progress group that he was a part of is 38 to 40 people, if I recall the numbers at that time. It would be about that number. Now, how many mechanics he serviced, I couldn't tell you, but it would be a greatly

reduced number on the weekend over what it would be during the week.

Q. Do you have any comparison—

The Court: What was his title, Mr. Kussmann, Crib Man or—

The Witness: Well, it is sort of a nonexistent title. He is a stores clerk and breaks down into groups that have had titles added to them, which is Progress, by a letter of agreement at that time, and the progress man is the man who does the work flow.

The Court: Did I understand his function, someone would call for a part, he would go back and locate the part and bring it out and furnish it, or what function?

The Witness: He might be asked to go get a specific part from the Kit Center; he might be asked to [249] get a part from a tool kit on the weekend, when he would be the only man there.

The Court: How many people would carry the same classification or people have training to perform this particular job?

The Witness: Well, the training is really not as great as is the segregation by seniority grouping. But during the week, as he witnessed, he drove a train throughout all of this and isolated his activities basically to the one single operation. When he was there by himself on the weekend, whoever that might be, he does that, the crib operation, which during the week we would have just one man, or two, that would do basically just that, the movement between the work areas, the areas then working, which might be done by specific people during the weekend, on the weekend he is the only guy to do that, too.

The Court: Well, apart from the question of seniority, perhaps counsel wants to get--at least I would like to get to it—how many other people in the employ of TWA could perform his assigned duties.

The Witness: Well, with limited instruction, any stores personnel we've got.

The Court: I understand, but I am talking about assuming, if one can assume in this day, the [250] absence of any seniority at all, to perform the function, how many bodies would be available to perform this work.

The Witness: In the grouping and not on the specific date?

The Court: Yes, in the whole group.

The Witness: Better than 200.

The Court: 200 available other people that could perform this job, any one of whom without detriment to the company could trade his Saturday without hampering the operation of the company, this is assuming no restrictions on seniority, is that a fair statement?

The Witness: That is a fair statement.

The Court: Is this what you are getting at?

Mr. Pickett: That is correct, that is one of the points.

Q. (By Mr. Pickett) Mr. Kussmann, you said on direct that when a person didn't show, you did one of two things, you had a person stay overtime or you had a person from another type of seniority grouping fill in in his place, is that correct? A. That is correct.

Q. Was this any breach of any seniority or any Union agreement whatsoever to do that? A. To move a man from another grouping, because someone is absent, is not a breach of any agreement. On a continuing [251] basis it would be, because it would indicate a company distortion of the seniority application.

Q. You would call that an emergency, then, is that correct? A. Yes.

Q. If it was continuing, it would be a breach of the agreement, correct? A. Right.

Q. Would you call the Hardison matter somewhat of an emergency? A. No, sir, I would not.

Q. Was it unusual? A. No, sir.

Q. Did you have a lot of other religious problems about people who couldn't work from Friday Sundown to Saturday Sundown? A. No, sir.

Q. Then how is it not unusual at TWA? A. In my opinion, Mr. Hardison had continued to work for an extended period of time, and he and I had discussed the fact that if this came, he would be expected to work and I feel that we had made sufficient arrangements for his religious tenets to take care of the unusual, his holidays, and I don't think that—or I didn't think at that time, and I still don't, that in keeping with normal industrial practices in this nation, that I could require [252] someone else to work in his place out of his work assignment on a continuing basis. If he were ill and couldn't come to work, it would be something else. A guy gets sick and can't come in, then we make emergency measures. But Mr. Hardison in this case did not come in, as far as I can recollect, and I have tried to in every way I know how, did not tell us he would not be there.

Q. But you called him in on March 6, two days before he was supposed— A. Because I was concerned.

Q. And you knew his religious tenets said he couldn't be there, didn't you? A. No, I didn't know they said he could not be there.

Q. Don't you remember the letter as early as April 25, 1968, to you, followed by a great period of correspondence which said that he firmly believed that he could not work between Friday Sundown and Saturday Sundown? A. I also remember the part of the discussion where he said he thought he could take care of his needs in keeping with seniority and he had not reached that plateau.

Q. That was before the vacation of Bill Wyatt. A. Yes, sir.

Q. In fact, March 8, 1969, was the first time that any person whatsoever or any problem whatsoever between TWA and Employee Larry Hardison's religious convictions came [253] into play? A. Basically.

Q. Is that not correct? A. Basically.

Q. And two days before the time they were to come into play you had a special meeting about how to cope with the problem, is that right? A. That is right.

Q. Now what was done to cope with the problem? A. We made some suggestions that might be done to allow him to continue on.

Q. And those suggestions were the ones you previously stated? A. Yes, that is right.

Q. Was anything else done? A. Not that I am aware of.

Q. Were there any surveys made of anybody in the Stores, whatever shift it may be, to see if they wanted to replace him? A. I don't know, and I normally would not do that.

Q. Who would? A. The steward.

Q. Well, did the employer, because you were concerned enough to call a meeting two days before, because you knew there was a problem, did you make any effort [254] whatsoever to contact anybody whatsoever to replace him on that particular religious holiday, or religious Sabbath? A. No, sir, I did not.

Q. Did anybody affiliated with TWA, that you had personal knowledge of or that you have been told, make any effort whatsoever? A. I would not know, because the normal contact on that would be the Union steward, and whether he did or not, I could not witness to.

Q. Sir, did you keep a specific personal file on the Larry Hardison matter, you yourself? A. Only the thing that has been introduced here, which was as they came in, the memos were put in his file.

Q. As a matter of fact, this April 25, 1968, memorandum and those things contained in your personal file were not made available to the E.E.O.C. investigation, were they, sir?

Mr. Mollenkamp: I object to that, Your Honor, I don't know whether the E.E.O.C. made any attempt to discover Mr. Kussmann's personal file, so I don't believe any request was ever made to Mr. Kussmann.

The Court: What difference does it make whether they were or weren't? E.E.O.C. found probable cause without it. I saw a great many duplications. The great [255] vacuum in this case is any file at all on the part of the Union. The Union hasn't marked anything as far as their processing of the case of any internal concern, as far as I have been able to find, didn't write anybody; purported to set up meetings on a pretty important subject.

Q. (By Mr. Pickett) Did you tell Mr. Butcher, your subordinate, of all of the correspondence, or share with him your file, prior to his March 21 memorandum which you have produced? A. I felt certain that I did.

Q. He was fully appraised of all the circumstances surrounding the Hardison religious matter with you prior to that memorandum? A. I am confident that he was.

Q. And approved it as well as Industrial Relations? A. I did.

Q. Now, when persons who are not working on the contract holidays, or according to your agreement with Mr. Hardison—strike. You had an agreement with Mr. Hardison that he would work the contract holidays if you would let him off on his religious holidays, correct? A. Insofar as able.

Q. Would this be that therefore there would be Union people that would be replacing who wanted off on the contract [256] holiday? A. Could be.

Q. Would this have been a breach on the seniority agreement? A. No, sir.

Q. Why? A. Because in that situation we try to get volunteers to work and then we force and reverse orders of seniority.

Q. Did you try to get anybody to work whatsoever to replace Mr. Hardison on the 8th or 15th, whatsoever? A. Did I?

Q. Yes. A. No.

The Court: Wait a minute, let me see if I understood. You called for volunteers, because it would be quite likely, for example, I would assume, that you take both a Christian and a contract holiday, Christian day, if you call for volunteers—how do you do this, by the way, bulletin board?

The Witness: Through the Union steward, sir.

The Court: Do you know what they do? Is that by way of mouth or posting on the bulletin board?

The Witness: It is by solicitation, not by posting.

The Court: All right, but whatever it is, you have no difficulty getting volunteers for someone that [257] wants to trade his obligation to work December 25th for someone that would want to trade with him.

The Witness: That isn't quite the way it is.

The Court: All right, I didn't understand it and this is why I would like to know.

The Witness: All right, take Christmas, for instance. The company determines the number of people that are required to maintain its services. We then advise the Union steward that we have this number of positions that must be filled by shifts. The Union steward then contacts to see who wants to work, and then if he is not able to fill that, then the junior people on that shift are required to work that contract.

The Court: In other words, you give preference to who does not have to work from the top of the list rather than bumping from the bottom?

The Witness: Well, when you go to forcing your seniority practices, you do it in reverse order of seniority.

The Court: So you really don't have a volunteer for trade. Does the contract call for double pay on contract holidays?

The Witness: Two and a half times now. Two times at that time.

The Court: All right, so you get some [258] volunteers on that.

The Witness: Not always, sir.

The Court: Do you have any experience in providing swaps for particular days that would not affect seniority as a matter of practice, either within your present experience on management's side—I also understood you to testify that your first employment with TWA was in a capacity for the Union after you got out of the Navy, right?

The Witness: Yes, sir.

The Court: So you have been on both sides of the table.

The Witness: Yes, sir.

The Court: Sometimes feel like you are in the middle of the table?

The Witness: Most of the time, sir.

The Court: Are there any circumstances under which there are trades for particular days that disregard seniority as a matter of practice?

The Witness: In the Union ranks in my area, sir, not to my knowledge.

The Court: Let me ask you this—

The Witness: Let me clarify if I may. That is for specific days. Now, there are some arrangements that are agreed to whereby we have changed days off or shifts, [259] as I witnessed earlier.

The Court: But this would handle the whole group, I would assume.

The Witness: Well, that was by agreed-to arrangement, yes, sir.

The Court: Now let me ask you this question. You have told me that there are approximately 200 people that could do this job. Assuming that you were not hampered by seniority requirements, what is your judgment as to whether or not it would be possible to find volunteers who would have been willing to have traded Saturday off for Sunday off, for example?

The Witness: The reason I hesitate is that you are asking the question in a complex area. It isn't just like saying from here to here. There are more than one working groups, and if it were not for a Union agreement or seniority provisions or anything else, if the company had the complete versatility to move people, no, there would not be that problem.

The Court: Of course, as the number of instances that you would have to make exceptional and special provisions increase, the difficulty of working out these arrangements, it would seem to me, would obviously increase, would that be true?

The Witness: It would be my opinion it would.

[260] The Court: And this prompts my final question before I ask counsel to continue. In your experience throughout your entire employ with TWA, how many instances do you know of where religious conviction has conflicted under circumstances similar to this? In other words, have you had any Seventh-Day Adventists, have you had any Orthodox Jews, who had the same Sabbath observation? There may be additional sects that have the Sabbath.

The Supreme Court, I think, quotes the particular member, particular chapter and verse in the Bible, that

at least Seventh-Day Adventists' selection of Sundown Friday to Sundown Saturday is based upon. My knowledge of Judaic tradition, I don't know. I am familiar that this was the traditional Orthodox Jewish Sabbath.

How many times within your experience clear back in 1965, with TWA, have you known of a conflict between religious consicence and assigned work duty?

The Witness: Limiting it to the Stores operation?

The Court: Yes.

The Witness: This is the only one that I can recall.

The Court: So it is a highly exceptional circumstance?

* * *

[261] A. No, what I was trying to illustrate was the fact that you can't predict what is going to happen when a man bids, and it always calls to mind a situation we had years ago with an individual who wanted to bid a lead job in particular work area, and the inclination was to say, "There is no possibility for you to get that job." [262] But through experience I didn't tell him he couldn't get it, because there is always that remote possibility. He went ahead and bid the job and ended up with the lead job on the day shift. If you tell a man he can bid from one place to another and the norms happen, this can happen. He might go right into that slot. But the thing that is not normal, you've got a bachelor that works the graveyard shift and he gets married and he wants to work days, and at the same time he comes up on that, that closes, so you just can't predict what is going to happen. I don't think anybody can in a seniority exercise that involves an opening where people are moving into a work section and seniority is applicable to those that are already there.

Q. One further question, sir. When March 8 and March 15 and March 22 were not worked by Mr. Hardi-

son, and let's presume nobody had filled his place, what would have been the maximum amount of hardship due to his absence, or a person's absence, from that particular job on that particular day have been to TWA? A. You mean if the job were not filled at all?

Q. That is correct, sir, for one day, one shift. A. Under the circumstances, as I can reconstruct them, if we did not have an hourly man to come in to work that shift, we would have worked it with a supervisor. It [263] would have been that important.

The Court: The problem here is notice. You don't have any problem if you get notice, so that you have time to fill this?

The Witness: Yes, we can have a problem with that, Your Honor. The Union is not required to work overtime except in an emergency, and this is not construed to be an emergency, and there have been periods of time when we could not get overtime.

The Court: But to fiil the vacancy and to avoid the use of supervisory personnel, the important thing to company was that "I am not going to show up to give you enough chance to see what your situation actually may be," wouldn't that be true?

The Witness: My attempt was to illustrate to counsel that in this case, where there are a number of mechanics working that need parts moved to them and obtained for them, we would have to supply this kind of manpower from some place, and that is what we did.

The Court: I think there is somewhere in the record that there was a suggestion made to the plaintiff that he simply report in sick on these days, and he suggested that his word should be yea and his word should be nay, as stated, is that true, and he wasn't going to lie about it? Did you have any discussions with him in [264] this connection? I am not sure whether it was the March meeting or not.

The Witness: No, sir, I did not.

The Court: You may continue, Mr. Pickett.

Mr. Pickett: One moment, Your Honor. No further questions, Your Honor.

Cross-Examination by Mr. Gordon

Q. Mr. Kussmann, let me make sure that I understand what I think was the sole import of your statement to Mr. Pickett, that the company would have had to work a supervisor if there was nobody else there to perform the job, or something to that effect. A. Right.

Q. Let me ask you this question. I am trying to focus you in on that area. Could the company have operated on that day if that job was not performed? A. The work in that area would have been greatly imperiled.

The Court: In what way?

The Witness: To say that the company could not have operated would be kind of a far-reaching statement. In the way that there were mechanics working who needed parts, that is what they were there for, is to work on specific parts, on engines or whatever the work may be that is assigned that day, and that is what [265] we are there for, is a service organization, and if the parts were not obtained for them, moved to them, moved from them, we could impair service, yes.

Q. And when you talk about those employees, are you talking about the 30 to 40 employees that worked that day? A. I don't know how many employees worked that day. I regret to say that—it is a matter of record and could be obtained, if you are talking about the mechanic force, and when I say an approximation, it would be an utter guess.

Q. Talking something about the Union Relief Committee, there has been some discussion about it, to your experience has the Union Relief Committee ever made

a permanent transfer as opposed to a temporary one? A. I am not aware of a permanent transfer, only temporary.

Q. In other words—I don't mean to put words in your mouth—in other words, the Relief Committee— A. May I correct that statement?

Q. Surely. A. When we moved from KCOB to MCI, there was one permanent transfer that was made, a man who had a heart condition, in the tool room. There was another one that has continued for a period of time, that I think time itself made it permanent, because the man had the seniority to hold it in what we call the Packaging Area, incapacitated [266] people. But the normal action of the dealings that I have had with this committee has been on a temporary basis.

Q. And isn't it true that usually their authority, I suppose you would say, extends for a 90-day period? A. Generally the request is for no longer than that. If it goes longer than that, for an extension.

The Court: Mr. Kussmann, I am intrigued with this Relief Committee. My impression is that it is more or less an ad hoc committee whose recommendation must be accepted by the Union, that they do not have plenary power to come to any agreement, but simply to recommend a solution to an exceptional problem. Is my impression correct?

The Witness: It is kind of difficult, Your Honor, for me to answer it, because I am dealing with what I consider to be a group from within the Union that speaks for them, and normally their terminating or culminating action is taken care of by letter, so I accept it as being a Union agreement.

* * *

[268] Q. (By Mr. Gordon) Let me just ask a few questions directed along that line as far as your experience

is concerned. Let's assume that Mr. Hardison did go to the Relief Committee and that the Relief Committee came up with—well, let's not use Mr. Hardison, let's say an employee goes to the Relief Committee with a problem and the Relief Committee comes up with a suggested solution. Before that solution is implemented, isn't it true that it has to be approved by management? A. Yes.

Q. And isn't it true that the Relief Committee on occasion, to your personal experience, has come up with proposed solutions that have been turned down by management? A. Been turned down by me.

Q. By you personally? A. Yes.

Q. So the fact that an employee would go to the Relief Committee doesn't necessarily mean that he would get relief? A. Well, I can't answer that.

[269] Q. It wouldn't necessarily, it would depend on the circumstances, I assume. A. Well, where I am involved, it would depend on what they brought to me as the alternate solution.

Q. You would consider it. A. I certainly would.

Q. I think maybe the notion is floating around that the Relief Committee has authority to reach decisions that management regards as vested in itself, and I am just trying to inquire as to whether that is a valid assumption. Does my question make any sense? A. Yes, to answer your question specifically, the Union committee, the Relief Committee, rather, has implemented nothing in my area without my concurrence. Does that answer you specifically?

Q. I hope so. I think it does. A. Or my subordinate's concurrence.

Q. Let's go to the March 6 meeting, and I think probably we have all agreed on some facts; I'm not sure that we have agreed on all of them. At the March 6 meeting, you proposed some suggestions which Mr. Tinder

didn't agree with, regarding the change of shifts or change of departments. Is that basically what we are talking about? A. I haven't said, I don't believe, that Mr. Tinder did not agree with them.

[270] Q. That is what I am trying to clarify. A. I would look to resultant action as to whether or not he was able to obtain agreement.

Q. Pardon me? A. I would look to resultant action as to whether or not he was able to obtain agreement.

Q. Do you recall a discussion involving whether Mr. Hardison could work a 4-day week and be excused on Saturdays without pay? A. My recollection says the discussion was related to he was willing to take the day off without pay on a continuing basis.

Q. Pardon me, are you done? I didn't mean to interrupt. A. Yes.

Q. Was that discussion acceptable to Mr. Tinder? A. I could not say that it was and I cannot say that it wasn't.

Q. Was it acceptable to you? A. It was not.

Q. Why not? A. Because this would deprive me of coverage on the day that I needed a man to work.

Q. I am a little curious, too, about the presence of Mr. Tinder. I assume it is a routine matter to call in the steward who serves an employee who has got a personnel [271] matter that either you want to discuss with him or he wants to discuss with you, is that the idea? A. Basically, but not always.

Q. Whose decision was it to call in Mr. Tinder on this occasion? A. I can't really answer that question. It could have been mine.

Q. Did you know Mr. Tinder before this meeting? A. Yes, sir.

Q. What is his capacity in terms of authority? A. Well, he had been the Union steward for some period of time in the area that we are talking about.

Q. What authority does the Union steward have in this type of discussion? A. Under the contract he is a representative that relates to those people. He is appointed by the Union or elected by the people in that section, depending on whatever the circumstances may be.

Q. Do you know if his authority extends beyond routine-type matters? What I am getting at, is it a significant influence on the relationship, if it isn't true that the company will either go to the local Grievance Committee or to the district for that matter. A. I don't understand your question.

Q. In your experience in relating to Union stewards, what [272] is your experience as to the scope of their authority to make changes that have an impact on the collective bargaining relationship? A. If they feel like they get beyond their authority or something that doesn't relate to them, they normally go to the committee.

Q. Would taking someone out of seniority and giving him a priority or giving him super seniority be this type of matter, if you know? A. If I were a steward it would be that type of matter.

Q. You used to be on the Grievance Committee, as a matter of fact. A. Yes, sir.

Q. I hope I can make myself clear. Is it true to say that all the employees who could have—all the employees within Mr. Tinder's—I'm sorry—that all the employees within Mr. Hardison's seniority grouping had rejected the weekend off by virtue of their previous bids? A. Are you asking me if they had?

Q. Yes. A. I cannot answer that question.

Q. Well, wouldn't the selection of seniority within that grouping indicate that those senior employees didn't want to work on weekends? A. It would indicate it, but your initial question would [273] cause me to have

to know whether everybody had been contacted, and I don't know this.

* * *

[275] Q. Fine, but if the Union disagreed with one of your proposed actions, you could go ahead and take it anyway and the Union would have to take steps to complain about it. A. Yes, sir.

Q. They don't have veto power. A. No.

The Court: You've never found any hesitancy of the Union complaining under that circumstance, have you?

The Witness: Yes, complaining, yes; but as far as taking the action, if I felt as a part of management, under the contract, I had the right to take the action and the Union must abide by it unless I jeopardize their safety or health and then grieve it.

* * *

[282] WILBUR STONE,

called as a witness on behalf of Defendant TWA, was duly sworn and testified as follows:

Direct Examination by Mr. Mollenkamp

* * *

[285] Q. In TWA's operation is the Kansas City Overhaul Base the location for all base overhaul operations systemwide? A. Yes.

Q. Would you describe what a base overhaul is? A. Well, a base overhaul, after an airline has flown a given number of hours, as approved by the Federal Aviations Agency, it then must be brought in for complete undressing, if you will, taking apart, inspections completely, and completely overhauled and rebuild anything that is either worn excessively or shows any signs of wear or corrosion or anything of that sort. These airplanes

come in usually of an evening on a weekend so that the small crew there in the hangar can get them ready for the larger crews coming in then on the main part of the week.

Q. So is it fair to say that the maintenance facility here is not just another line maintenance, but it is the most major facility that TWA has? A. It is the only overhaul base and the main major repair station.

Q. How often are the operations at the overhaul base conducted? A. Well, I guess you would best answer that as continuously. There are 7 days a week, 3 shifts every day, 365 days a [286] year.

Q. Why is that necessary? A. Because you have to repair and receive items from the field that may have been removed because of airplanes that are presenting some problem with some piece of equipment or something—the time control on some of the items is up and they have to be brought in and they have to be repaired and you have to get them turned around in the shops and back out to the field, because if they are not out to a foreign location someplace, either as standby or repair on an airplane, it may be necessary even to get one off the ground, and a flight could be delayed or passengers cancelled off a flight or something of that sort, because the equipment isn't available.

Q. When you say the equipment isn't available— A. I mean the airplane. Wouldn't be ready to go, is a better way of saying it.

Q. Does the Kansas City Overhaul Base include the Stores Department? A. Yes.

Q. What is the work of the Stores Department at the overhaul base? A. Well, I would describe it as the department that receives shipments coming in. It receives materials coming in on [287] our own airplanes from out in the field, including units for rehire, units

that may be damaged, units that are worn or time controlled or something, bending of parts and so on, in the general stock rooms and transportation of parts and pieces between shops and between buildings.

Q. And is that operation also conducted on a 7-day-a-week basis? A. Yes, sir.

Q. 365 days? A. 365 days a year.

Q. 3 shifts per day? A. Right.

* * *

[293] The Court: If Mr. Stone was in charge of the examination that was made at that time, and he made that examination, or if it was made under his supervision, I would be very happy to hear it.

Mr. Mollenkamp: I will put that question to the witness.

Q. (By Mr. Mollenkamp) You are familiar with the details of the Hardison case, isn't that correct? A. Yes.

Q. What hardship, if any, would have resulted from attempting to accommodate Mr. Hardison's request for Sabbath— A. Well, the first hardship you run into is the absence of a person who is necessary to perform essential function. If you take other action to correct that, then you have robbed from someplace else where you have already had to adjust your work force to put everybody you can on to the regular work week with Saturdays and Sundays off in keeping with the request and interest of most of the [294] people, so that you have so few people, then, to call upon and so little interest to call upon under an agreement such as we have, that you just can't get there without additional overtime or robbing something someplace.

Q. You said that was the first problem. Are there others? A. Well, the second problem you would run into would be that if you did something under our agreement, if you did something to violate the basic agreement

or the basic understanding, then you would run into troubles with the people who are complaining, and as a matter of fact that would be true whether you had an agreement or not.

The Court: Mr. Stone, I want to be sure that I understand your answers. I gather from your answers that you are assuming that any arrangement and any accommodation that might be made to take care of the highly exceptional situation presented by Mr. Hardison's case; Mr. Kussmann, who has been with TWA since 1945, both sides of the table, says to his knowledge this is the only case like it that he has ever heard of.

So we are talking about one single accommodation. But my question to you is whether your answers do not assume that any accommodation that may be made must be made within the framework of observation of the [295] seniority provisions in your contract.

The Witness: Yes, to a degree, that is true.

The Court: Well, isn't it to a total degree that it is true?

The Witness: Well, I don't think so.

The Court: Well, I want to know why you don't think so.

The Witness: The reason I don't think so is that when you have as high as 4400 people in one place or 2500 people, roughly, represented by a Union, or another 1500 people who are non-management people, clerical and others working in an organization, there has to be some kind of a systematic or organized or accepted way that people appreciate how these kinds of things have to be done, and to move in against something that is understood and appreciated and sometimes demanded, to require them to do something different does present problems, and so then you end up with a lot more complaints, a lot more dissatisfied people, than you had before.

The Court: Well, as I understand that, that still is predicated upon the difficulties that would be implicit in doing anything except following the procedures that are provided in the contract as to transfers, hours, days, shifts, in accordance with the seniority requirements.

[296] A. Well, that would be true unless you would have developed some other kind of a system to take care of it. I suppose you could go alphabetically or go by age or color of hair.

The Court: That is exactly right, and the question in this case—you have been here throughout the case—is whether or not the Congress of the United States said to management and Union, "You've got to develop some supplemental system to take care of these cases." That is the question in this case.

I don't decide the question, but I am required to find whether or not there is hardship within the meaning of the law, and I have difficulty understanding how one can claim hardship if he leaves out whether some additional system for handling these exceptional cases has been devised and attempted.

Now, I can understand completely that circumstances may be present where you have a single employee who is of critical importance and very highly specialized expertise where it would be exceedingly difficult to make any kind of an arrangement, but in light of Mr. Kussmann's testimony, I can't conceive that you have this type of individual when there are at least 200 people located in Kansas City that if they were willing, and if not barred by seniority, could not be put in that [297] slot and perhaps, as he indicated, you might have any number of people quite willing to do so, to create a Sunday for a Saturday, because Sunday is generally more a family day, if the wife is working—if she is in a store she may be working Saturday, and married couples could be together on Sunday, but of course all this is speculation until somebody systematically made some inquiry as to what sort of reaction and how big a problem you really had to cover the 200 additional people who are qualified to do this job on any day.

Now, do you disagree with his estimate of 200 other people that could have filled this job?

The Witness: In terms of the basic qualifications of what they would do when they were on the job, I don't disagree. I have no basis for disagreement. He would know that better than I.

The Court: It is not a unique job.

The Witness: No, but I think there are other factors involved beyond just the qualifications of the individual, because once you establish by any device, whether it is alphabetically or whatnot, to try to get people—as you say, Sunday is the family day off, you try to give people Saturday and Sunday off, then trading Sunday for Saturday doesn't solve your problem, you've got to go back further into that and interfere with more [298] people than just the person who might have already Saturdays and Sundays off and could switch the two, and out in the field stations you can frequently come up Mondays, Tuesdays, Wednesdays, Thursdays, Fridays, Saturdays, and a combination of days off, whereas, at the overhaul base we mostly have Saturdays and Sundays off.

* * *

[304] Q. (By Mr. Mollenkamp) In your capacity as Director of Industrial Relations, Kansas City Overhaul Base, do you have responsibility for the administration and enforcement of the collective bargaining agreement? A. Yes.

Q. Do you feel that uniform application of the seniority principles among all TWA employees covered by that contract is important? A. Yes.

Q. Why? A. Well, for the reasons I have indicated a moment ago, you have to have some kind of a way of solving problems with vacations and days off and things of that sort, and an accepted and preferred method is in effect to allow the person who has been around working with you for a longer period of time to have the first choice on those things.

Q. And is that the reason for Article VI of that collective bargaining agreement? [305] A. I suppose so, yes.

Q. And that is the seniority provision, is that correct? A. Yes.

Q. Is it TWA's policy to make every possible effort to arrange work schedules to allow Saturday and Sunday off as regularly scheduled days off at the overhaul base? A. Yes.

Q. Why is that not possible in all cases? A. Well, it is because of necessity to keep things moving and get things in and get things out of the overhaul base on Saturdays and Sundays in order to meet the flight schedule of the airlines, some of which can be effective even a day or so later.

The Court: What is TWA's policy, Mr. Stone, as to recognition of conscientious religious scruples against working on Saturday?

The Witness: Well, in any instance that I have known about where people had problems of that kind, except this instance, they have been able to adjust them by actually observing the day that they preferred.

The Court: Well, what is TWA's policy under those circumstances where they cannot be adjusted under seniority?

The Witness: Beg pardon?

The Court: I say, what is your policy if they [306] can't be adjusted by reason of the application of the seniority provisions in your Union contract?

The Witness: Well, we would try wherever we could to make adjustments, allow the person to accommodate himself.

The Court: Suppose that is impossible, what would be your policy then?

The Witness: If it were impossible, our policy would be we would have to terminate the person because he couldn't meet his work schedule.

* * *

[344] Q. (By Mr. Mollenkamp) Mr. Stone, what would happen if TWA posted a bulletin board notice advising all employees that they may request days off for religious belief? [345] A. I think we would have a considerable number of people who would want to make changes that we couldn't accommodate and continue to operate.

Q. Would that impose a hardship on TWA's operation? A. Yes, it would.

Q. In what way? A. Well, in two or three ways. One, you would not be able to meet the schedules that would require many of the people—or at least would be in response to a request of many of the people to have Sunday off, and we have to have operations which would be an additional application. The other thing would be in the administrative area trying to find out and schedule arranged to move people around if that were necessary to do so.

Q. I believe in his testimony yesterday Mr. Kussmann stated that there were approximately 200 stores clerks who had the basic qualifications to do the same work that Mr. Hardison did, is that correct? A. He did, yes.

Q. Now, were those 200 employees scheduled to work, to the best of your knowledge, on March 8, March 15, or March 22, which were all Saturdays? A. No, they would not all be scheduled on those days.

Q. In other words, we don't have 200 stores clerks scheduled to work on Saturday. [346] A. No.

Q. In fact, what is the number to the best of your knowledge? A. Oh, I think in that section on that shift there were only about four, and in the middle of the week there are probably 15 or 20 in the regular work week, so the relationship is something like that, as I recall.

Q. You are talking about— A. In the Progress group. That is my recollection.

Q. On Mr. Hardison's specific shift within the Progress section of Stores in Building 2, and of those four on the shift on Saturdays, would each of those four be assigned to different jobs as Mr. Kussmann I believe described? A. Well, I don't know—I guess I must have misunderstood the question. I don't think there were four people in his classification working on Saturday. There were four people on his shift, of which only one was working Saturday and Sunday, as I recall. Now, what was the other question that relates to that?

Q. I am trying to clarify that and that is my understanding. A. Okay.

Q. Now, in addition to the basic qualification of stores clerks, what other factors are involved in assigning these individuals to work? A. Well, in the stores function at that time there were about 10 sections, departments, that had been called at various [347] times and are now called seniority groupings. They were referred to that way yesterday by Mr. Kussmann, or in the questioning, at any rate. Those break themselves down into somebody at the warehouse, somebody in the stock room in Building 1, somebody in the stock room in Building 2, some of them in Progress Building 1, and some in Progress in Building 2, and then there are enough more to make up 10 out of that total group. I think maybe the Kansas City Municipal Airport was another group, and I don't

just remember what the other one was right now. And in the division into those various functions you assign or request enough people to work that operation on all shifts 7 days a week as required. Then that number of people has to be broken down into the regular work week by shift and enough of the carry-over on that weekend to provide coverage for weekends and whenever those functions are necessary to be operated.

Q. What is TWA's policy in respect to accommodating employee requests for religious observances? A. Well, the basic policy would be, we would try to accommodate that request by transfer or swap, and where the Union is involved, with their consideration and to the degree that that could be accommodated, and beyond the transfer or swap, really, is a better term, the next thing we would do would be to try to accommodate if we [348] could without interfering with the work that the person is expected to do, allowing the time off or in some instances people are allowed to make up the work that they take the time off.

Q. And it is only after you attempt those things that you reach the ultimate problem that faced Mr. Hardison, namely, a discharge, is that correct? A. Yes.

The Court: May I make an inquiry as to this case? It is my clear understanding that nobody made any effort whatever to find out whether any one of the potential 200 people wanted to swap so they wouldn't have to work Saturday, as far as Mr. Hardison is concerned. Is that impression correct?

The Witness: I can't answer what your impression is, Your Honor.

The Court: Well, let me ask you if you have any knowledge that anybody made any effort whatever to find out whether any one of the 200 people would rather work—would like to swap with Mr. Hardison?

The Witness: I wouldn't have that knowledge.

The Court: Well, do you have any knowledge that any effort was made?

The Witness: No, sir, I would not be privy to that information.

[349] The Court: You would know about it, wouldn't you?

The Witness: I would know if something happened, yes.

The Court: Well, you would know because you have helped prepare the defense of this case, isn't that true?

The Witness: Yes, to a degree.

Q. (By Mr. Mollenkamp) Isn't it true, Mr. Stone, that if efforts were made to query the 200 employees about their willingness or unwillingness to work on that day, that those efforts would be made by the Union steward and not by the company? A. Yes.

The Court: Well, that is assuming that seniority agreement is absolutely sacrosanct and must be followed under these circumstances.

Q. (By Mr. Mollenkamp) Well, do you have any knowledge of what the Union steward did in inquiring of those 200 employees about willingness or unwillingness to work Saturday? A. I have no knowledge of that.

The Court: I think it is undisputed that they didn't do anything, isn't that true, Mr. Gordon?

Mr. Gordon: I think that is true. If there is [350] any dispute, it is over whether they can do it on their own or whether they are required to do it on a directive by management.

The Court: All right.

Q. (By Mr. Mollenkamp) Do you have any knowledge that there was any intention on the part of TWA to discriminate against Mr. Hardison because of his religious convictions?

Mr. Pickett: I object, Your Honor. This gentleman—

The Court: Oh, objection overruled, overruled, overruled. Of course he didn't. That is your testimony. Let's get on to the next question.

A. That is my question.

Q. Your answer? A. Yes—repeat the question.

The Court: You did intend to fire him, didn't you?

The Witness: Yes, when that time came, yes.

The Court: All right, let's get going.

Q. (By Mr. Mollenkamp) Well, is it your testimony that there was no intention to discriminate against Mr. Hardison in the discharge on account of his religious convictions? Is that your testimony? A. That is true.

* * *

[352] *Cross-Examination by Mr. Pickett*

* * *

[358] Q. And that is the only hardship, isn't that true, that TWA might have had by accommodating Mr. Hardison, having somebody else working in his place or somehow not allowing him to work on the Sabbath?

* * *

A. No, that is not the only hardship TWA might have had. The one hardship in trying to accommodate Mr. Hardison, by TWA, by itself, without the action of the Union, could have resulted in grievances by people whose seniority would have been affected if we had taken some kind of [359] bilateral action.

Q. Were there any other hardships to TWA's business that you as an individual would know of that would have occurred if any accommodations or efforts were made for Mr. Hardison's religion on those days in question, other than what you just mentioned? A. Yes, I think so.

Q. And what are those? A. Would you repeat your question again?

The Court: What counsel is doing is having you state all the hardships that in your judgment as head of Industrial Relations, TWA could suffer.

Isn't that what you are getting at?

Mr. Pickett: That is correct.

The Court: Why don't we start out again.

Q. (By Mr. Pickett) You have told me one hardship, Mr. Stone. The last one you told me, that there would be a problem with the Union because of grievances from other people—

Mr. Gordon: I object to that as a misstatement of what he said. He said there would be a problem with other people—

The Court: Objection will be overruled.

Q. Outside of the problems that might occur with the Union persons, what other hardship or problems, when conducting [360] its business, would Trans World Airlines have had by accommodating or making an effort for Mr. Hardison to observe his Sabbath in their business? A. Well, the business would reflect other places—I mean the effects of that action could reflect other places on outside activities besides just what the mechanics were doing at the overhaul base.

Q. So that— A. So that if parts were necessary for operation in the field or if parts were due out in the field and they weren't progressed in that department so they could be finished up or picked up in the shop, or gotten back for shipment out to the field, there might be a delay on a flight the next day, someplace else, a whole planeload of passengers might be discommoded as a result of that.

Q. There were three shifts on Mr. Hardison's day, is that not correct, there were 24 hours a day, three shifts a day? A. I assume so. I don't know about that in particular.

Q. Mr. Hardison only covered one shift over an 8-hour day, isn't that correct, sir? A. That is right.

Q. So are you saying to this Court that TWA's business in the conducting of its airplanes facilities would be totally disrupted and put into a state of chaos by this individual not working an 8-hour shift in taking parts and [361] picking up parts from mechanics working on, I assume no more than one airplane at a time? A. I am saying it could be.

Q. Are you saying that it is? A. I am saying that it is disrupted when parts cannot be processed and moved as they should be. Frequently there are things that are very essential, and if those aren't moved then it is a real hardship. Flights have been delayed as the result.

Q. But—

The Court: Well, let me find out. Isn't your answer to that question based upon an unstated implicit assumption that you would be unable to even fill Mr. Hardison's spot—

Mr. Pickett: That is my next question, Your Honor.

The Court: —and it is absolutely essential that he has to work from Sundown Friday to Sundown Saturday?

The Witness: That is only partially true, Your Honor, because if no one works the job he is obligated to work—

The Court: I understand your answer to the question about the chaos and the disruption of the entire TWA system is that if Mr. Hardison doesn't work on his [362] Sabbath, you would be totally unable to have anybody else work his shift. Isn't that true?

The Witness: Well, I am saying that if it were impossible to get anybody else to work for his shift.

The Court: That is exactly what I am saying. You are saying that it is impossible to fill it up?

The Witness: It is impossible—it was impossible without robbing from somebody else.

Q. (By Mr. Pickett) But in truth and fact, didn't his supervisor fill those spots or didn't you take somebody else from another job so the function was fulfilled on those days, sir? A. In fact he would have pulled somebody from another function that he was supposed to perform.

Q. My question was, as a matter of fact, wasn't that what was done and somebody did fulfill that function? A. I am sure somebody did fulfill that function, but some other function suffered as a result.

Q. Is Mr. Hardison qualified and a possessor of such a degree of expertise that his presence on that particular time from Friday Sundown to Saturday Sundown would completely disrupt the airlines activities? A. I don't think it is a matter of expertise. It is a matter of being available to do the things that have to be done at that time.

[363] Q. But you didn't try and get a substitute for him out of the number of other employees that might have had the same qualifications, did you, sir? A. I think Mr. Kussmann did.

Mr. Pickett: No further questions. Thank you, sir.

The Court: Do you have any questions, Mr. Gordon?

Cross-Examination by Mr. Gordon

* * *

[364] Q. The last step being arbitration before a system board of adjustment. [365] A. Well, the system board of adjustment is in effect kind of an arbitration process, grievance machinery.

Q. Out of, I believe you said a hundred or so that come out of MCI— A. A hundred to two hundred, let's say.

Q. A hundred or two hundred that come out of MCI, do you have any notion of how many of those involve seniority? A. Well, there would be a lot that would involve seniority, because seniority is involved in the problem of assigning people to other departments, people being assigned to other departments when a more senior person feels he may have had that, he gets involved in the specialty classifications and so on. There would be quite a number.

Q. Would it be fair to say from your point of view as a management official that the employees represented by the Union involved in this case take seniority as a very serious and important contractual right? A. Yes, it would.

Q. Do you have any opinion on what the effect on the employees' morale or attitude toward the company, and for that matter, toward the Union, would be if the provisions in the contract were not followed?

Mr. Pickett: I object, Your Honor. He is not a member of the Union.

[366] The Court: Mr. Pickett; I believe he is about to run down, because how this question can have any possible basis for a judgment of opinion of this man as to the morale of hundreds upon thousands of employees under circumstances that never has been attempted is beyond this Court's comprehension. I don't know how this man is in a position, or any other man is in a position, to express an opinion that means anything without some factual base upon which to do it.

Mr. Gordon: Well, I tried to establish—

The Court: Furthermore, the question is totally outside the scope of examination by either other counsel. Now let's finish up whatever other questions you want to ask and get this witness off the stand.

Mr. Gordon: This is my last question. Is the objection sustained, sir?

The Court: Anybody else have any additional questions?

Mr. Gordon: I didn't understand if the objection was sustained.

The Court: I was hopeful you were about to run down, and I still entertain that hope, although I am beginning to doubt it. How much longer do you have?

Mr. Gordon: I would like an answer to that question that was objected to. I didn't understand the [367] Court's ruling.

The Court: Don't you know what the answer is? The answer is that in his judgment it would have a terrible effect upon the morale.

Isn't that right, Mr. Stone?

The Witness: That is right.

The Court: What basis do you put that on?

The Witness: I put that on the basis that even people who are not in the contract are also highly concerned about some standard system of having things apply to them and their choice of shifts where they do have to have their shifts in this organization—

The Court: But you don't have any experience to base that on, do you?

The Witness: Yes, sir.

The Court: You do?

The Witness: Yes, sir.

The Court: When have you had a reaction among the employees of TWA because you made somebody shift a job because of religious grounds?

The Witness: I thought the question was about seniority, sir.

* * *

[377] EARL BOX,

called as a witness on behalf of the Defendant Union, was duly sworn and testified as follows:

Direct Examination by Mr. Gordon

* * *

[379] Q. When was the first time that you heard of Mr. Hardison and his problems? A. I don't know as I could say the exact date. It was somewhere along about the 1st of March, though, I think.

Q. Do you recall if it was before or after the first Saturday that Mr. Hardison didn't work? A. I believe it was just before.

Q. What happened on that occasion? A. Well, Steward Tinder contacted the Grievance Committee and related the problem that might develop and asked for advice.

Q. Where was this conversation? A. In the Grievance Committee office.

Q. Who was present? A. I was, George Barnes and Jay Fisher.

The Court: Was the plaintiff there?

The Witness: Not at that time, no.

The Court: Thank you.

Q. (By Mr. Gordon) What was said at this meeting about Mr. Hardison that you can recall?

Mr. Pickett: I object on the ground that any statement by third parties is hearsay.

The Court: Why doesn't this call for hearsay?

Mr. Gordon: Well, first of all, it is submitted [380] to show later motivation, and second—

The Court: Is it an exception to the hearsay rule that to prove motivation hearsay is admissible?

Mr. Gordon: My understanding is that hearsay is defined as an out-of-court statement asserted—used to prove the truth of the matter—

The Court: Let's assume for the moment that motivation is relevant. On what do you base the notion that motivation has something to do with this case?

Mr. Gordon: I think one important factor is why the Union took the action it took.

The Court: I understand, but I am asking you what legal authority do you have that says the motivation of the Union is a relevant factor in the determination of the issues presented in this case?

Mr. Gordon: Well, at the very minimum there is either—part of the Act—I believe it is part of the Act that limits liability where the liability is based on non-purposeful discrimination. That is the very minimum.

The Court: What section of the Act are you making reference to?

Mr. Gordon: I can't give you that.

Mr. Mollenkamp: It is 2000(e)(5)(g).

The Court: Well, we will get into that. I [381] am going to even let hearsay in. It is obvious that you cannot base any finding of fact upon any testimony that Mr. Box may give as to what other people may have said to him. He can testify as to what he said. Mr. Box's participation in this, I think, is reasonably well apparent as to what he thought (a) of whether or not the plaintiff was conscientiously devoted to his religious scruples; and, second, whether or not this was a case which in Mr. Box's written language, as appraised April 5, 1969, which was a Saturday, said—

You were the author of the letter that said, "This is a sad case in which we find an individual torn between a loyalty to his job and loyalty to his religious beliefs"?

The Witness: Yes.

The Court: You are the author of that?

The Witness: Yes.

The Court: Have you changed your mind about it?

The Witness: No.

The Court: You may continue your examination.

Q. (By Mr. Gordon) Can you tell me what happened at this meeting, with special reference on what you said concerning Mr. Hardison? A. Well, Mr. Tinder outlined what he thought was the facts of the case of what might happen, and collectively the [382] three committee members tried to explore every avenue that might get us out of this problem.

Q. Go ahead. I didn't mean to interrupt. A. Unfortunately, everything that we could think of doing involved some prior action by the company, and so at that time we decided to merely wait and see what happened.

Q. Did you specifically discuss changing shifts or changing departments or working without pay, that type of thing? A. We discussed all of those, also discussed proposals of working six days a week to get the one day off.

Q. Was there a second meeting after this—well, excuse me. Let's go back. How long would you estimate that meeting lasted? A. About 45 minutes.

Q. Was there a second meeting concerning Mr. Hardison? A. Yes, after the—he missed the first Saturday, which I believe was March 8. Mr. Tinder came back and said we now really had the problem. We again explored all the possibilities and could come up with nothing that—any action that we could take or initiate or that we thought we could initiate.

Q. Mr. Hardison was not present at the second meeting, either, is that correct? A. No.

* * *

[385] Mr. Pickett: And the fourth, sir?

The Witness: The fourth was to plead leniency and possibly keep him on the job and possibly win the whole thing at a higher step.

Mr. Pickett: Thank you.

Q. (By Mr. Gordon) Did Mr. Hardison have a reaction to these four alternatives that you have outlined? A. His initial reaction was to just tell the company flatly that they couldn't discharge him; however, we discussed that possibility and explored it and told him that in our opinion this was a sure way of getting a discharge settlement out of it, and that once you got off the job it was much harder to get you back than it was if we could keep you on the job until the case was settled.

The Court: Mr. Box, at this meeting of your committee when you were discussing the alternatives, had you consulted counsel in regard to what other alternatives may be available or was this simply based upon your past experience as a member of the Grievance Committee?

The Witness: It was based upon past experience, and then the files on past discharge cases.

The Court: Was the matter submitted to counsel for the Union?

The Witness: No.

* * *

[386] Q. Is there a rule that the Union recognizes concerning discharges that involve insubordination and that also [387] involve orders given by the company that the employee disagrees with? A. Well, we have arbitrators, as you well know, that have set down a rule that we are stuck with, I guess, that any time the company gives you an order, then it is up to you to follow that order and file a grievance if you disagree with it.

Q. And that is a recognized rule. A. Right.

Q. That at least the Union thinks it is stuck with, or at least exists out at the plant. A. Right.

Q. I'm sorry, but I don't remember if you concluded on my original question which was to the effect of what the result of this discussion with Mr. Hardison was concerning the four alternatives. A. Well, at that time he indicated that we probably knew better, knew more about discharge cases than he did, and told us to use our own judgment on how to present them.

Q. And what was your judgment about how to present them? A. Our judgment was plead for leniency and perhaps get a complete reversal at higher level.

Q. Was this decision based in any way on Mr. Hardison's religion? A. No.

* * *

[389] The Court: Mr. Box, let me ask you this question. What is your judgment of what the committee would have done and what you as chairman of the committee would have recommended had you been advised that the order to report on March 8 may have been in violation of a law of the United States? Would you have recommended the course that you followed or would you have recommended and followed a course described by you as a head-on attack?

The Witness: I would have personally recommended the same course that we followed.

The Court: Even if the company's orders were in violation of the 1964 Civil Rights Act.

The Witness: Yes, sir.

The Court: Why would you have done that?

The Witness: Because, as I previously stated, once a man is discharged and off the job it is much harder to get a reversal out of the company. If you can keep him on the job and there is no monetary loss involved, the company is more likely to reverse their field.

The Court: Well, didn't you know in these [390] circumstances that under no circumstance was there anything except discharge that was indicated unless you could convince the company that some sort of a suspension or a letter in his file or something of that sort, some other sanction, would have been imposed? You didn't have a shred of doubt in your mind that he simply was never going to work on Saturday, did you?

The Witness: I always assumed that the member told the truth unless I had some reason to believe otherwise. However—

The Court: Well, the reason I say that is that on April 7 you stated that Mr. Hardison indicated, and I am quoting from your letter, which is an exhibit here, that under no circumstances could he violate his religious beliefs even to save his job. Is that what you believed at the time?

The Witness: This is what he said and I have no reason to disbelieve him.

The Court: So that it was immediately apparent in light of his seniority situation that about the only thing the company had to do would be to fire him, because his seniority situation was such that he was going to draw this Saturday shift, as he did draw it, March 8, March 15 and the following Saturday work. I can understand your general policy that you are better off and [391] have a leeway for negotiation while someone is still on the job, but I am wondering in this particular circumstance where it would seem to me to be almost inevitable that discharge was clearly indicated, why is it you would not have elected to have met the issue head-on, particularly if you had been advised that the company's assigned reason of insubordination may have been in violation of the 1964 Civil Rights Act?

The Witness: Was that a question, sir?

The Court: Not a very good one.

Mr. Gordon: If I might, I might be able to clear that up a little.

Q. (By Mr. Gordon) Did Mr. Hardison have a change in shift assignments between the third Saturday that he missed and the discharge hearing? A. Yes.

The Court: Did that have any effect at all concerning what we have been talking about?

The Witness: It had a tremendous effect on the committee because we thought we had the solution. Up to that time, the information that we had was that he couldn't work Saturdays, period. And when we heard that he went to twilight we thought we had the case won, actually, because this then would allow him to work the full week. However, as I think has been already in the [392] record, I believe it was the 28th of March he quit work at Sundown, which blew our case back up again.

Mr. Gordon: Have I covered that sufficiently?

The Court: Yes, I think so.

Q. (By Mr. Gordon) During this meeting, any of these meetings prior to the discharge hearing itself—I would like to make sure that we have covered all the meetings, prior to the discharge hearing itself. At those meetings did you tell him about the procedure that the contract called for in terms of what his alternatives were if he would lose his discharge hearing? A. We covered all the steps of the grievance procedure at both meetings, and also the civil suit was discussed at both meetings.

Q. Did you discuss District 142? A. It was discussed that this would be the next step that would handle the next step of the grievance procedure, yes.

The Court: Well, you indicated to him very clearly, did you not, that you were not going to take the head-on approach under any circumstances?

The Witness: No, sir.

The Court: Well, what did you mean when you wrote Mr. Bowman, when you said, "We patiently explained the situation to Mr. Hardison. He insisted on a hearing [393] and all we could do was plead that discharge was too severe." What do you mean by that language? I would take it from that that you had ruled out the head-on approach for the reason that you stated and you patiently explained to him what your position was going to be, which was not a head-on approach but simply a plea for leniency because in your judgment if he were actually fired it would be a more difficult case to get straightened out. Now, that is my understanding of your testimony. Do I misunderstand you?

The Witness: I believe so.

The Court: Well, you tell me about it, because I want it straight.

The Witness: As I stated at both meetings, we outlined what we thought was the possibility. We asked him if he had any other approaches to go, you know, possibilities, and then we asked him if he wanted to select the approach. At both meetings he said, "Use your best judgment."

The Court: Well, do you think this was a selection on his part?

The Witness: Obviously he thought that we knew more about it than he did.

The Court: I understand that, but the question is, did you think you were doing what he wanted done?

* * *

[395] Q. (By Mr. Gordon) One question, then. Those are notes, [396] I take it, that you took at the discharge hearing? A. The second page is notes that was taken at the discharge hearing. The first page is a brief, short brief, made up off of our notes reflecting the case that we processed to the district.

Q. Both of those pages went with your subsequent letter, I believe, April 7, that was sent to Joe Bowman? A. Yes, sir.

Q. Do you recall how long the discharge hearing lasted on March 31? A. I would say 45 minutes, about 45 minutes.

Q. Do you recall if Mr. Hardison said anything about the hearing? A. No, sir. The Hearing Officer, as usual, at the end of the presentation of the company, or the Union, asked if anybody had anything additional to add, and nobody said anything additional.

Q. Would it be fair to say that Mr. Hardison had a chance to say something if he wished to at the discharge hearing? A. Yes, sir, before he went into the hearing I told him to sit right beside me and any errors that was made, so that he could correct the errors, you know, he could tell me what it was and I could correct it. And at the end, he had an opportunity to say whatever he wished to say.

[397] Q. Did you talk with Mr. Hardison as you left the hearing? A. Yes, sir, we walked back over to the committee office and he walked with us and we discussed the case, and he was wondering what the decision was going to do.

Q. Well, can you tell us what the substance of that was rather than just—the broad outlines? A. Of the discussion, you mean?

Q. What was the discussion as you left the discharge hearing? A. Well, the discussion, he wanted to know what we thought the Hearing Officer—what his decision would be, and we told him in our opinion, that it was going to be discharge. He at that time wanted to know again, wanted to cover the subsequent steps, and we went through those again with him.

Q. Did you talk to Mr. Hardison after that time? Well, let's stop there. You say "we", I take it you mean the other two grievance committeemen. A. The other two grievance committeemen and Mr. Hardison and I.

Q. No company people present?

The Court: Any mention of the 1964 Civil Rights Act at this hearing, Mr. Box?

The Witness: None.

The Court: Thank you.

Q. (By Mr. Gordon) Did you see Mr. Hardison after that time? [398] A. He came to the Grievance Committee office roughly a day or two after the decision came down and he received a copy of it.

Q. Who else was there? A. The other two Grievance Committee members and then there was various people coming in and out. This was not a closed meeting.

Q. But the people coming in and out weren't concerned with Mr. Hardison's problem, they were just in and out of the office, is that a short way of saying it? A. Yes.

Q. How long did the meeting last with Mr. Hardison? A. About 30 minutes.

Q. What was said in the meeting? A. Well, he was wishing to explore the possibility of resigning from the company and keeping his record clear. He was worried about what the future steps in the Grievance procedure would be if he didn't resign. We explained the steps to him one more time, told him that we was in the process of making the file up to forward it on to the district, told him that in our opinion the company would not accept a resignation at this time, and clear the record.

Q. Is that the last conversation you had with Mr. Hardison? A. To the best of my knowledge it is the last time.

[399] Q. Do you ever recall meeting him in a hallway and having him ask you a question and you saying "No," or "No way," and turning around and walking off? A. No, sir.

Q. Did you have any conversations with Mr. Bowman about Mr. Hardison? A. I had numerous conversations with Mr. Bowman, yes.

Q. When was the first? A. As far as the time, I don't believe that I could put a time on it. He normally came up to the overhaul base, at least two or three times a week, and I think we asked him every time he came up, beginning immediately after we submitted the case to him.

Q. Were any of these discussions before your—let's call it your transmittal letter of April 7? A. I can't remember.

Q. All right. Do you recall what the discussion was with Mr. Bowman concerning Mr. Hardison? A. Well, we was naturally interested in the case. We asked Mr. Bowman every time if he had a meeting set up with Hardison to discuss the case, you know.

The Court: Mr. Box, in your conversations with Mr. Bowman do you know whether he consulted counsel in regard to this case? Did he indicate that he had talked to the Union's lawyer about it at all?

* * *

[404] Q. (By Mr. Gordon) I believe my last question was to discuss [405] or describe the conversations that you had with Mr. Bowman concerning Mr. Hardison. A. As I previously stated, every time, or practically every time, he came up we would ask what progress had been made and he reported to us that he had made many attempts to get hold of Mr. Hardison, in fact, had set up two meetings with Mr. Hardison; however, he could never get with Mr. Hardison to discuss the case. Finally—

Mr. Pickett: Your Honor, I just note that my objection as to hearsay was a continuing objection.

The Court: That is right, it will be noted and overruled.

I assume Mr. Bowman is going to testify, is he not?

Mr. Gordon: Yes, sir.

A. Finally he stated that he had to assume, since he couldn't contact Mr. Hardison, that he was no longer interested in the case.

Q. Are you familiar with any other employees who had not complied with the grievance procedure, as you understand it, and have their grievances subsequently dropped either by the district or the local? A. I don't understand the question.

Q. Were there any other employees, to your knowledge, other than Mr. Hardison, who hadn't complied with the grievance [406] procedures who had their grievances dropped? A. Yes, sir.

Mr. Gordon: I have no further questions.

The Court: You may cross-examine, Mr. Pickett. Do you need a recess?

Mr. Pickett: No, I think I can do it.

Cross-Examination by Mr. Pickett

* * *

[415] Q. Now, you also said in your affidavit to E.E.O.C. that Mr. Hardison showed you a case in Iowa saying that an [416] employer couldn't do this, right? A. He showed us a newspaper clipping. What the extent was, what law it was filed under, I do not know.

Q. Well, did you follow it up? A. There was not even any date on the clipping, as I recall. I don't know what newspaper it came out of. How do you follow it up?

Q. Did it ever refer to the fact that a private employer could not fire somebody for his religion? A. It dealt with a case from—I believe it was the Seventh Day Adventist, I believe, and I don't even recall what court it was in. It might be a city court for all I know. I don't really know.

Q. But you had that knowledge just after the discharge hearing, did you not? A. Have the knowledge before the discharge hearing, sir?

Q. You didn't raise that at the discharge hearing, did you? A. I am not a lawyer, sir. I wouldn't know how to argue it.

Q. But after you got that knowledge you didn't ask a lawyer, either, did you? A. No, sir.

Q. Did you pass that knowledge on to Mr. Bowman? A. Mr. Hardison was going to pass the knowledge on to him, from what he said.

* * *

[418] *Cross-Examination by Mr. Mollenkamp*

* * *

[419] Q. Could you elaborate on that discussion, please? A. Well, as far as the shift involved, I don't really remember what shift was involved. I just remember that we discussed Mr. Hardison bidding out of Progress to some other seniority grouping or bidding off of the day shift in Progress to another shift.

The Court: Mr. Box, I am under the impression that all of the alternatives considered in this regard were strictly within the framework of seniority law as contained in the contract in the various alternatives that might be available consistent with seniority by groups and by ranking within a group, is that correct?

The Witness: Yes.

The Court: And that you did not explore, indeed, because you did not feel any necessity to explore, any alternative that would be outside of the seniority requirements of the contract, am I correct under that impression?

The Witness: We explored all possibilities that would not discriminate against another employee.

The Court: That is right, and that everybody's seniority rights would be respected in the alternatives that you did explore.

* * *

[423] Q. Was there ever any discussion between you and Mr. Tinder about the Union Relief Committee? A. Not to my knowledge, no.

Q. What is the Union Relief Committee? A. It is an unofficial committee who, if the company has a problem or the Union has a problem, the company gets together with this committee and the company takes some action and possibly the committee will recommend to the Union that this is something that we should overlook for a temporary period of time.

Q. Do you feel that the Union Relief Committee could have worked out Mr. Hardison's problem? A. As I understood Mr. Hardison, he had a permanent problem, not a temporary problem.

* * *

[443] JOSEPH WHITNEY BOWMAN,

called as a witness on behalf of the Defendant Union, was duly sworn and testified as follows:

Direct Examination by Mr. Gordon

* * *

Q. On the International? [444] A. No, sir.

Q. You presently hold a position for Local 1650? A. Job Steward in the Aircraft Department.

Q. Isn't it true that you are presently plaintiff in an action filed in this court against both Local 1650 and District 142? A. Yes.

Q. You were assistant business chairman—assistant—A. General chairman.

Q. Of District 142 at the time of this Hardison matter, is that correct? A. Yes, sir.

Q. And you received a transmittal letter from Mr. Box together with some notes, I believe, is that correct? A. Yes, sir.

Q. Now, following the receipt of that letter, did you make any attempts to contact Mr. Hardison? A. Yes, I did.

Q. What were these? A. I tried to contact him by telephone, I tried to contact him by visits to his home, I contacted his father-in-law who I knew at Trans World Airlines, and asked if he would get this boy to come down and see me and let's see if we can get this problem resolved.

* * *

[446] The Witness: Yes, sir.

The Court: Now, let us assume that the telephone messages that you may have left at his home or the word that you sent through the father-in-law—

The Witness: I also made visits to his home.

The Court: But you didn't catch him either time.

The Witness: Neither time, and I left a note in his door.

The Court: Now, suppose he came to talk with you, did you have any different advice to him than that which you stated to Mr. Box, namely, that "After review of this case it is my opinion the Union cannot help this brother."

The Witness: The only review I had before me was what Mr. Box had sent me and I could get no further information from Mr. Hardison because he wasn't available.

The Court: How much additional information did you feel that you needed? What did you want to ask him? Now, to refresh your recollection—

The Witness: I certainly hate to go in any kind of a meeting without a little knowledge of what it's all about from the so to speak horse's mouth.

* * *

[450] The Witness: I did not, no, I did not.

The Court: You may continue.

Q. (By Mr. Gordon) Would the Union Relief Committee be something that the local would have dealt with or something that you would have dealt with as Assistant General Chairman? A. I don't think the Relief Committee has any authority anyhow, not under the contract—they just try to help solve some unwanted problems that they inherit.

Mr. Mollenkamp: I move that the answer be stricken as not responsive to the question.

A. All right, sir.

The Court: Do you have additional questions?

Mr. Gordon: Did you overrule—did you want to rule his objection?

The Court: I am going to overrule it, because I am overruling everybody's objections.

Mr. Gordon: All right.

Q. (By Mr. Gordon) Joe, was there a time set under the collective bargaining agreement in which you must file your appeal from a discharge? A. Yes, 10 days.

[451] The Court: Now that is in evidence and I'm going to start sustaining some objections. The factual data to make that argument is apparent in this case by reason of the contract provision, which this Court, as I have advised counsel, is intimately familiar with. That is how I know it is in there. Now, ask another question that isn't already established.

Q. (By Mr. Gordon) Joe, have you dismissed discharge cases before because employees have failed to cooperate with your processing of the case? A. Yes.

Q. Was the fact that you took in writing the letter to Mr. Box, I think May 2, motivated in any part by Mr. Hardison's religion? A. No.

Mr. Pickett: Object, Your Honor, calls for a conclusion.

The Court: Objection is overruled.

Mr. Gordon: I have no further questions.

The Court: You may cross-examine, Mr. Pickett.

[452] *Cross-Examination by Mr. Pickett*

Q. You received the letter on April 7 from Mr. Box, correct? At least it was dated that and you received it thereafter? You knew Mr. See, the father-in-law, rather intimately, or at least you knew him. A. I knew he worked for TWA. Yes, I know Mr. See.

Q. Then did you also know his wife had left him seven days after his discharge or about the 9th of April, 1969? A. I had heard, yes, and that is one of the reasons I made the second trip to his house, to see—well, maybe Mr. See didn't notify Mr. Hardison, and I personally wanted to go out and see, but no answer to the door.

The Court: Do you remember what you said on the note, Mr. Bowman? That is a long time ago.

The Witness: Yes, I told him something about it is imperative that I talk to you if I process this case beyond this point, and stuck it in his door with my name and card, you know, just a business card, on the back of a business card. It was gone on the second trip that I made out there, also.

The Court: Fine, thank you.

Q. (By Mr. Pickett) Did you make a carbon of this note? A. No.

Q. Did you set up any file whatsoever on this grievance? [453] A. Yes.

Q. Did it contain anything other than the two letters which are in evidence here today? A. No.

Q. Did you in fact find out from Mr. Cy See whether or not the plaintiff was still living there after his wife had moved everything out? A. No, I didn't.

Q. Did you try and find out where he was living? A. I didn't go to the post office to find out, no.

Q. Did you try and find out where he was living? A. I tried. I didn't find the man.

Q. How did you try? You said you tried to find out where he was living. How did you try? A. I asked different people if they knew where I could get hold of Mr. Hardison, how I could contact him, and sit down and talk with him.

The Court: I would assume you could have gotten his address off the employment record.

The Witness: I had his address. I went to his house.

The Court: And this is where it was, but you cannot testify that he was still living there.

* * *

[457] Q. (By Mr. Pickett) Sir, did Mr. See have any conversation with you about setting up any appointments for you to see Mr. Hardison? A. Yes, I told him to definitely send him to my office.

Q. On what date? A. I don't recall right now.

Q. Was this written correspondence to Mr. See at all? A. No, sir.

Q. Okay. A. I met him in the hall at the overhaul base. I made special trips up there to see Mr. See, when I couldn't locate the young man.

Q. Are those the only efforts you made, that which you just stated to the Court today? Were there any other efforts on your part? A. No, sir.

* * *

MEMORANDUM AND ORDER

(Filed May 15, 1974)

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International Association of Machinists and Aero Space Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650), seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was a violation of his religious liberty, contrary to 42 United States Code, §2000e-2. Plaintiff is a member of the Worldwide Church of God.

The jurisdiction of this Court is based upon 42 United States Code §2000e-5(f). Defendant TWA is an employer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code §2000e. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. §2000e-5(d). That argument is answered by the decision of our controlling court in *Richard* v. *McDonnell Douglas Corporation*, 469 F. 2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt

of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. §2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See *Deboles* v. *Trans World Airlines, Inc.*, 350 F. Supp. 1274 (E.D. Pa. 1972) and *Claycraft Co.* v. *United Mine Workers of America*, 204 F. 2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See *Moody* v. *Albermarle Paper Co.*, 271 F. Supp. 27 (E.D. N.C. 1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor

Act (45 U.S.C. §153, et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by *Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, ... U.S. ....., 42 L.W. 4214 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those rele-

vant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52 (a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the Union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. §2000e-(2)(c):

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discriminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged

discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. §1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bargaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below, has been applied to unions. See, e.g., *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made

this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970), Professor Harry T. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate place an intolerable burden on the employer. They described the burden of proving the absence of undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI (b), Pl. Ex. 30). The contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provi-

sions be ignored. Professor Edwards and Mr. Kaplan discuss this problem at length:

> Assume that an employer operates a seven-day-a-week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could not be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by

ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose 'a priority of the religious over the secular" [69 Mich. L. Rev. at 628] and would perhaps raise constitutional questions.[1] See *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. §2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. §2000e-2(h)].

---

1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in *Otten* v. *Baltimore & Ohio R.R.*, 205 F. 2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . He must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F. 2d 980 (5th Cir. 1969); and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See *Maclin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 988 (D.C. Cir. 1973), and *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977, 988 (W.D. N.Y. 1970), rev. on other grounds, 446 F. 2d

652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i.e., negotiating a nondiscriminatory contract, *Robinson* v. *Lorillard Co., supra*; or processing grievances of discrimination, *United States* v. *Bethlehem Steel Corp., supra.*

In this case, since the collective bargaining agreement was essentially non-discriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl. Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl. Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1, where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might

arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (P. Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility

of the union waiving his seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was, therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept

his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967). We do not find that Local 1650's representation of the plaintiff in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by #2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts complained of, 42 U.S.C. 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . . [29 C.F.R. §1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 649 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey*, an employee alleged he had been wrongfully discharged from his employment because of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966. The Court in *Riley* v. *Bendix Corp.*, 464 F. 2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance to the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made

a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In *Riley* v. *Bendix Corp., supra,* the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. §2000e-(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at §228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Company*, 429 F. 2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S. Ct. 2186, 29 L.Ed. 2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that

weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971)) indicate that regulation 29 C.F.R. §1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in *Committee for Public Education and Religious Liberty* v. *Nyquist, et al.*, 413 U.S. 757, 772-773 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take time off from their jobs for religious observances so that employees with religious beliefs are aided as against nonbelievers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e.g., *Walz* v. *Tax Commissioner*, 397 U.S. 664 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973).

The duty to accommodate, as stated in 42 U.S.C. §2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposes a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. §1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the

employer's business. See, e.g., *Riley* v. *Bendix Corporation*, 464 F. 2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl. Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl. Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl. Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing his request for specific religious holidays off (Pl. Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl. Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation." (Pl. Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a

shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 131-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business. First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA for use at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In *Jackson* v. *Veri-Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5:00 p.m. Friday and 5:00 p.m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay.

In *Riley* v. *Bendix Corp.*, 404 F. 2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F. Supp. 583 (M.D. Fla. 1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accommodate Riley's religious observance or practice without undue hardship on the employer's business.

In *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in *Reid* v. *Memphis Publishing Co.*, 7 F.E.P. cases 13 (W.D. Tenn., December 17,

1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copyreader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copyreaders who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1 (D. Ore. 1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the employer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held

several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problems had plaintiff, to suit his own convenience, transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the conduct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union. (Article VI (b), Pl. Ex. 30). With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. §2000e-2(h), which exempts different treatment to different employees based upon a bona fide seniority system from the other provisions of §2000e-2. That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

ORDERED that the Clerk of the Court enter judgment for defendants.

Kansas City, Missouri
May 15, 1974

EXCERPTS FROM AGREEMENT BETWEEN TRANS WORLD AIRLINES, INC., AND THE MECHANICS AND RELATED EMPLOYEES IN THE SERVICE OF TRANS WORLD AIRLINES, INC., AS REPRESENTED BY INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

AGREEMENT
BETWEEN
TRANS WORLD AIRLINES, INC.
AND
THE MECHANICS AND RELATED EMPLOYEES
IN THE SERVICE OF
TRANS WORLD AIRLINES, INC.
AS REPRESENTED BY
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND
AEROSPACE WORKERS

ARTICLE II

Scope of Agreement

(a) The Company agrees all work generally recognized as mechanical inspection work, mechanic's work, and helper's work performed in and about Company shops, major stations, overhaul bases, line service stations, and other Company facilities, including but not limited to mechanical work involved in dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of airplanes, airplane engines, radio equipment, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith, and including the dismantling, repairing, assembling, and erecting of all machinery and mechanical devices and automotive and building maintenance and repair work, the work of Fire Inspectors, the work of Store Clerks, and the work of Ramp Servicemen in the handling of stores stock, commissary supplies, mail, express, cargo, and freight is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement.

* * *

(c) It is agreed that all work covered by this Agreement shall be performed by employees in the classifications specified herein, except that at other than major stations or overhaul bases on shifts where there is not sufficient work as herein described for Ramp Servicemen to justify the assignment of an employee coming within such classification, any employee who is in the same or higher pay bracket may be assigned to do the work. At stations other than major stations or overhaul bases on shifts where Ramp Servicemen are assigned and there is not sufficient work to justify the assignment of an additional employee in such classification, any employee covered by the Agreement who is in the same or higher pay bracket may be assigned to do the work. Except at overhaul bases, employees in the same or higher pay bracket may be assigned to do the work of Fire Inspectors where there is insufficient Fire Inspector work to justify the assignment of an employee so classified.

The number of employees in each classification will be established by the Company in accordance with the normal requirements of the service. Employees will normally perform the work of their classification; however, it is recognized that at major cities (1) where more than the scheduled number of flights are on

the ground at one time, (2) in cases of emergency where it is necessary in order to maintain operating requirements, or (3) where work within their regular classification is not available any employee who is in the same or higher classification may be assigned to the performance of work normally performed by the classifications of Ground Service Helper, Fleet Service Helper, Ramp Serviceman, or Janitor. In this event it is understood, however, that employees outside the classifications covered by this Agreement will not be assigned to perform this work if employees in the same or higher classifications covered by this Agreement are available and can be assigned without interfering with their regular duties. When an employee is assigned the work outside his classification, another employee in a different classification shall not perform the regular duties of the employee so assigned. If the Union doubts the fairness of the assignment, it may invoke the grievance procedure for settlement of the matter.

The total mechanical work force and the number of mechanics necessary in each specialty will be established in accordance with the normal work-load requirements. Mechanics will confine their work to their specialty except (1) when work within their own specialty is not available, mechanics may be assigned to any mechanical work; and (2) during abnormal operating conditions mechanics may be assigned to any work in the same or lower pay classification other than that to which they are normally assigned, to the extent necessary to maintain flight schedules, even when work within their regular assignment is available.

* * *

ARTICLE IV

Classifications of Work

* * *

(b) Stores Classifications

(1) Stores Clerk

A Stores Clerk will do all work generally recognized as the routine duties of a Stores Clerk in and about the Company storerooms and stockrooms. The duties of a Stores Clerk shall include the delivering of parts and materials at overhaul bases and other places where mechanics do not accomplish this work. The duties of a Stores Clerk shall also include the driving of trucks in transporting stores supplies.

(2) Lead Stores Clerk

A Lead Stores Clerk will be familiar with all the duties of a Stores Clerk and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(3) Receiving Inspector

A Receiving Inspector will be capable of inspecting and will inspect material received by the receiving section when inspection is required or assigned. It is understood that these employees will not do any work recognized as mechanics' work.

* * *

ARTICLE VI

Seniority

* * *

(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

* * *

(g) General:

* * *

(4) Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department at a point. During the first ninety (90) days of their employment, probationary employees may be assigned such shifts and days off as determined by the Company. Seniority may be exercised only in case of bumping due to a reduction in force or when an opening occurs. At locations where seven (7) or more employees are assigned to the daylight shift, members of the Union's Local Committee designated in accordance with Article XI (a) (1) shall have preference of assignment to such shift and preference of assignment to Saturday and Sunday off, provided that such member has the ability to perform, in a satisfactory manner, the work required of the particular job. Such preference shall continue only during the respective terms as Committeemen and only so long as they are assigned to fixed shifts. At locations where employees work rotating shifts, members of the Union's Local Committee shall have preference of assignment to Saturday and Sunday off. In preparing days off and shift schedules, the Company will determine how many employees are needed based on the type of work needed and the classification.

An employee who is notified that his shift and/or days of preference has been accepted and then refuses to accept such assignment will not be permitted to bid for a different shift and/or days off assignment for six (6) months after such refusal. This shall not apply at any location where shift and day off preference are solicited verbally. An employee may withdraw his bid at any time prior to the time the local Union representative is notified of an opening.

* * *

ARTICLE VII

Hours of Service

* * *

(b) Forty (40) hours, consisting of five (5) eight-hour days, worked within seven (7) consecutive days, midnight Sunday to midnight Sunday, will constitute a standard work week. Each employee will have two (2) consecutive days scheduled as regular days off in each work week, and the only deviation from this practice of two (2) consecutive days off will be where under the local schedule adopted, it is found necessary to rotate scheduled days off and in order to repeat the schedule, deviation is necessary. At overhaul bases, every reasonable effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regular scheduled days off. The fixing

of a work schedule allowing part of the employees of a facility Sunday of one week and Monday of the following week as regularly scheduled days off will not be deemed a violation of this provision. Five (5) days' notice must be given of change in the schedule of days off.

* * *

Article VIII

Overtime and Holidays

(a) Overtime rate of time and one-half, computed on an actual minute adjusted to the nearest tenth of an hour basis with a minimum of one (1) hour overtime, shall be paid for all work performed in excess of eight (8) hours in any one day, for all work performed either in advance of or after regularly scheduled hours, and for the first eight (8) hours worked on one of the two regularly scheduled days off each work week.

* * *

(d) Employees covered by this Agreement will observe the following holidays: New Year's Day, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. Should any of the foregoing holidays fall on a Sunday, the following Monday shall be considered as the holiday, and should any of the foregoing holidays fall on a Saturday, the preceding Friday shall be considered as the holiday. Any employee required to work on any of the foregoing holidays shall be compensated at the rate of double time and a half.

* * *

(g) Except in an emergency, an employee will not be required to work overtime against his wishes.

* * *

Article XIX

Shift Premiums

* * *

(c) The Company and the Union may, at any point, change from fixed to rotating shifts, or vice-versa, by mutual agreement.

The Company may establish relief schedules which require employees to work on different shifts in order to provide day off and vacation relief for other employees. In establishing rotating vacation relief schedules every effort will be made to avoid rotation between shifts during the work week. Except as provided in Article II(c), a rotating relief employee(s) shall not perform work out of his classification. The rotating relief shall have two consecutive days off each week and shall not rotate shifts more often than twice each week. An employee on a relief schedule who does not rotate between shifts during his work week shall be paid shift premiums in keeping with paragraph (a) and (b) of this Article, as applicable. An employee on a relief schedule who is scheduled to work on the day and afternoon shifts during a work week shall receive sixteen (16) cents per hour above the day shift rate for all shifts worked. An employee on a relief schedule who is scheduled to work on the (1) afternoon and night shifts, (2) day and night shifts, or (3) day, afternoon and night shifts during a work week, will receive twenty-one (21) cents per hour above the day shift rate for all shifts worked. Relief positions shall be bid and filled in accordance with Article VI.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF MISSOURI, MAY 15, 1974

LARRY G. HARDISON, Plaintiff,

v.

TRANS WORLD AIRLINES et al.,
Defendants.

No. 20096-1.

United States District Court,
W. D. Missouri, W. D.

May 15, 1974.

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International association of Machinists and Aero Space Work-Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650) seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was a violation of his religious liberty, contrary to 42 United States Code, § 2000e-2. Plaintiff is a member of the Worldwide Church of God.

The jurisdiction of this Court is based upon 42 United States Code, § 2000e-5(f). Defendant TWA is an em-

ployer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e et seq. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. § 2000e-5(d). That argument is answered by the decision of our controlling court in Richard v. McDonnell Douglas Corporation, 469 F.2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. § 2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See Deboles v. Trans World Airlines, Inc., 350 F.Supp. 1274 (E.D.Pa.1972) and Claycraft Co. v. United Mine Workers of America, 204 F.2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See Moody v. Albemarle Paper Co., 271 F.Supp. 27 (E.D.N.C.1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor Act (45 U.S.C. § 151 et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those relevant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act

of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discriminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his

schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. § 1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bargaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other pro-

visions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. § 2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e. g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), Professor Harry E. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate places an intolerable burden on the employer. They described the burden of proving undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over

the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI(b), Pl.Ex. 30). That contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provisions be ignored. Professor Edwards and Mr. Kaplan discussed this problem at length:

> Assume that an employer operates a seven-day-a week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose "a priority of the religious over the secular" [69 Mich.L.Rev. at 628] and would perhaps raise constitutional questions.[1] See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. § 2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

---

1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in Otten v. Baltimore & Ohio R.R., 205 F.2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(h)].

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969); and Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va.1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C.Cir. 1973), and United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 988 (W.D. N.Y.1970), rev. on other grounds, 446 F.2d 652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i. e., negotiating a nondiscriminatory contract, Robinson v. Lorillard Co., *supra;* or processing grievances of discrimination, United States v. Bethlehem Steel Corp., *supra.*

In this case, since the collective bargaining agreement was essentially nondiscriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl.Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl.Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1 where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher

wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (Pl.Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility of the union waiving its seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made

and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). We do not find that Local 1650's representation of the plaintiff in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached

The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by #2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts complained of, 42 U.S.C. § 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . . [29 C.F.R. § 1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites Dewey v. Reynolds Metals Co.; 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey,* an employee alleged he had been wrongfully discharged from his employment because of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966.

The Court, in Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance on the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In Riley v. Bendix Corp., *supra,* the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. § 2000e(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§ 227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at § 228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429

F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see Griggs v. Duke Power Co., 401 U.S. 424, 433, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)) indicate that regulation 29 C.F.R. § 1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in Committee for Public Education and Religious Liberty v. Nyquist et al., 413 U.S. 756, 772-773, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul of this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take time off from their jobs for religious observances so that employees with religious beliefs are aided as against non-believers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e.g., Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo.1973).

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposed a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29

C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the employer's business. See, e. g., Riley v. Bendix Corporation, 464 F.2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl.Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl.Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl.Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing

his request for specific religious holidays off (Pl.Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl.Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation" (Pl.Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 121-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business. First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract

and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of a very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In Jackson v. Veri-Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D.La.1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5:00 p. m. Friday and 5:00 p. m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay.

In Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F.Supp. 583 (M.D.Fla.1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accom-

modate Riley's religious observance or practice without undue hardship on the employer's business.

In Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in Reid v. Memphis Publishing Co., 369 F.Supp. 684 (W.D.Tenn.1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copy-reader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copy-readers who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F.Supp. 1 (D.Or.1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the employer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's

religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problem had plaintiff, to suit his own convenience, not transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the conduct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his

time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union (Article VI(b), Pl.Ex. 30). With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h), which exempts different treatment to different employees based upon a

bona fide seniority system from the other provisions of § 2000e-2. That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

Ordered that the Clerk of the Court enter judgment for defendants.

DECISION OF EIGHTH CIRCUIT, DECEMBER 16, 1975

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424

Larry G. Hardison,
Appellant,

v.

Trans World Airlines, Inc., International Ass'n of Machinists and Aero Space Workers, International Ass'n of Machinists and Aero Space Workers, District 142, and International Ass'n of Machinists and Aero Space Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 10, 1974
Filed: December 16, 1975

Before LAY, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the guidelines on religious discrimination promulgated thereunder,

29 C.F.R. §1605 (1974). Larry G. Hardison, a member of the Worldwide Church of God, initiated this employment discrimination case against his union and his employer following his discharge as a Trans World Airlines (TWA) stores clerk for alleged insubordination. The factual background of this litigation is not disputed, and, in summarizing the relevant details, we rely heavily upon the findings of the District Court,[1] reported in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).

Hardison's job was covered by a collective bargaining agreement negotiated with TWA by the International Association of Machinists and Aero Space Workers, The International Association of Machinists and Aero Space Workers, District 142, and the International Association of Machinists and Aero Space Workers, Local 1650, all defendants below.[2] That agreement contained seniority provisions relating, *inter alia*, to days off and vacations.

The Stores Department at the Kansas City International Airport, in which Hardison had worked from June 5, 1967 until his discharge on April 2, 1969, operates twenty-four hours per day, seven days per week. Hardison initially worked as a stores clerk in Building No. 1, performing work which was essential to TWA's operation but not unique. In the spring of 1968, Hardison began studying the teachings of the Worldwide Church of God. That religion requires its members to refrain from all work on certain designated holidays as well as on its Sabbath, which occurs each week from sundown on Friday

---

1. The Honorable John W. Oliver, United States District Court for the Western District of Missouri.

2. While distinctions between the local, district, and international unions are made by appellees in this appeal, our holding makes it unnecessary to take account of such distinctions, and the unions are sometimes for convenience collectively referred to herein as "the union".

to sundown on Saturday. Hardison discussed his religious studies with Everett Kussman, the Manager of the Stores System, who notified a TWA supervisor by memo as follows:

> 1. Agreed to Steward seeking swap of days off.
>
> 2. Agreed to odd holidays (excused T.O.) *if* he works the 'Christian' holidays when requested.
>
> 3. He advises you are getting him another job—agreed *you should*. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong Ambassador College Pasadena Calif.

Soon thereafter, the supervisor notified Kussman that he had been unable to make any "headway" in trying to resolve the problem. Hardison continued to work on Friday evenings and Saturdays, including some voluntary over-time work. On October 4, 1968, Hardison wrote Kussman that he had transferred to the 11:00 p.m. to 7:00 a.m. shift as a result of which he would be able to observe the Sabbath and would soon formally enter the Worldwide Church of God. He reminded Kussman of his assurance that Hardison would be excused from work on certain holidays under those circumstances. Subsequently, he furnished Kussman at his request a list of religious holidays and dates thereof.

On December 2, 1968, Hardison bid for a position as a stores clerk in another section in Building 2 in order to obtain a day shift position. Hardison indicated that his reason for transferring to the Building No. 2 section was his recent marriage: he felt day work would be more compatible with married life. Each of these stores clerk sections was governed by a separate seniority list. Thus, although Hardison had relatively high seniority in Building No. 1, he had the second lowest seniority position

in Building No. 2. As a result, his ability to select days off was considerably diminished.

In March, 1969, Bill Wyatt, the man on the bottom of the seniority list in the Building No. 2 section, went on vacation. Hardison was called to substitute for Wyatt, whose work schedule included Friday evenings and Saturdays. On March 6, 1969, Hardison met with Kussman and James Tinder, a union steward, to discuss the conflict between this schedule and Hardison's religious practices. Several possible adjustments were explored,[3] but since all required Hardison to do some work on the first Saturday, March 8, none of these adjustments were instituted. Hardison did not file a grievance concerning this unsatisfactory resolution although he knew he had a right to do so.

Hardison did not report for work on Saturday, March 8, informing the storekeeper that he had personal business to do. Hardison was likewise absent from work on the following two Saturdays, March 15 and March 22. He was then notified that a discharge hearing had been scheduled. Prior to that hearing, Hardison met with Local 1650's grievance committee. Various avenues of legal redress and defenses were discussed, and it was decided that the best approach would be a plea for leniency coupled with an effort to obtain reversal at a higher lever in the event of an adverse result. The possibility that the union might waive its seniority rules to permit Hardison to work on a different shift was not discussed. Following the meeting Hardison voluntarily changed his shift to the "twilight shift" (3:00 p.m. to 11:00 p.m.) in an effort to resolve the problem. When Hardison left work

---

3. These included such possibilities as changing Hardison's shift, changing his job, or permitting him to work four days per week rather than five.

early (at sundown) on Friday, March 28, however, it became apparent that this change in schedule would not obviate future problems as Local 1650 had hoped.

The discharge hearing was held on March 31, 1969, before TWA representative J. H. Frey. Although Local 1650 argued that termination was too severe a penalty, Hardison was found guilty of insubordination and discharged on April 2, 1969. Thereafter, both Local 1650 and District 142 attempted to contact Hardison about pursuing the matter further, but upon receiving no cooperation from Hardison, they dropped the case.

Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission which deferred to the Missouri Commission on Human Rights. On February 10, 1972, after all administrative procedures had been exhausted, Hardison filed suit against TWA and the three unions in United States District Court pursuant to 42 U.S.C. §2000e-2.[4] He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial to the court on primarily stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts. *Hardison* v. *Trans World Airlines, supra.*

In essence, the decision below held that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants. Hardison appeals, contending that the District Court's findings of reasonable accommodation and potential undue hardship were clearly erroneous. Separate briefs have been filed by Hardison, the unions, TWA, and by two amici curiae seeking reversal, the Equal Employment Opportunity Commission and COLPA (National Jewish Commission on Law and Public Affairs).

4. Federal jurisdiction was established below under 42 U.S.C. §2000e-5 and is not challenged on appeal.

The issues before us include the alleged unconstitutionality of Title VII and the guidelines on religious discrimination, the extent of the unions' duty of fair representation under the circumstances presented, and whether the findings below that the defendants had fulfilled their respective duties to attempt a reasonable accommodation, short of undue hardship, of Hardison's religious practices were clearly erroneous.

I

STATUTORY AND REGULATORY FRAMEWORK

Our review must necessarily begin with an examination of the controlling statutes and regulations.

The Civil Rights Act of 1964 specifically forbids employers from practicing religious discrimination in specifically enumerated ways.

42 U.S.C. §2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

42 U.S.C. §2000e-2(c) provides:

It shall be unlawful employment practice for a labor organization—

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The EEOC is empowered to promulgate regulations in aid of the statute. 42 U.S.C. §2000e-12(a). The original guidelines provided:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

29 C.F.R. §1605.1(a)(3), 31 Fed. Reg. 8370 (1966). The regulations were modified in 1967 to provide:

> The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b), 32 Fed. Reg. 10298 (1967). The EEOC further placed upon the employer "the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. §1605.1(c), 32 Fed. Reg. 10298 (1967).

The possibility that the revised regulations might impose a burden (to accommodate) not contemplated by the statute which posed "grave constitutional questions" of violation of the Establishment Clause of the First Amendment was raised in dicta in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). *Dewey* also concluded that Title VII only prohibited acts taken with intent to discriminate. This conclusion was rejected by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1972, Congress incorporated the substance of 29 C.F.R. §1605.1(b) into the Act by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. §2000e(j).

This amendment has been held to have eliminated all doubt that the guideline at 29 C.F.R. §1605.1 reflects the will of Congress. *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972);[5] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The District Court likewise so held, and we agree.

TWA LIABILITY

29 C.F.R. §1605.1, which we hold to be consistent with the statute, defines the parameters of the employer's duty. The company may not accept the role of a Pontius Pilate.[6] An effort to accommodate the employee's religious observances must be made. Such accommodation need only be a reasonable one. An accommodation alternative which imposes undue hardship upon the employer's business is unreasonable and not required. The burden of demonstrating its inability to reasonably accommodate falls upon the employer.

The record reflects a consistent effort by Hardison to acquaint TWA with his religious conversion and the

5. In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent.

6. Matthew 27:24.

effect of that commitment upon his ability to work during his Sabbath period and certain other religious holidays. He made no demands which were not consistent with his known religious beliefs. He was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met. He even transferred to the twilight shift in order to minimize the impact of his absence on the company.

We cannot agree with the company's contention, apparently accepted by the District Court, 375 F.Supp. at 891, that Hardison's transfer from Building No. 1 to Building No. 2 was evidence of a lack of cooperation on his part. The implication is that if Hardison had not transferred he would have retained enough seniority in Building No. 1 to protect himself against Sabbath day assignments. This is not accommodation. To limit Hardison's right of transfer within the company as a condition of accommodation would be "to discriminate against [him] with respect to his * * * conditions, or privileges of employment, because of [his] * * * religion * * *." 42 U.S.C. §2000e-2(a)(1). The purpose of this transfer was to obtain a daytime shift, Hardison having recently married. While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contended that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate. *See Riley* v. *Bendix Corp.*, *supra*; *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 4-6 (D. Ore. 1973) (Employer should have attempted a temporary accommodation in view of its large work force).

Hardison's job assignment in Building No. 2 was to pick up or deliver parts needed by mechanics working in the building. He was to "run the train", that is, to continually make the rounds of the shops in the building. He was part of a work force of 38 to 40 people, although he would be the only person running the train during his particular shift on the weekend. TWA conceded that there were over 200 available employees who were capable of performing Hardison's work.

The District Court concluded that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business. Upon a full review of the record, we must respectfully disagree with both conclusions.

Alternatives Rejected

(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this,[7] but the company would not agree because it would be shorthanded during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transferred, but urged that this would cause some other shop function to suffer. Similar arguments have been rejected by the Equal Employment Opportunity Commission. E.E.O.C. Decision No. 70-580 (March 2, 1970), 2 FEP Cases 516, 1973 CCH EEOC Decisions ¶6120; E.E.O.C. Decision No. 70-110 (Aug. 27, 1969), 2 FEP Cases 225, 1973 CCH EEOC ¶6062.

7. Hardison was also willing to work a six-day week but this solution was in apparent violation of the 40 hour per week clause of the contract.

In determining whether a possible accommodation would result in undue hardship or mere inconvenience, we must look to the facts of each case. The burden of demonstrating undue hardship is upon the employer. In this case, the company contended that a short week for one man during the temporary period of Wyatt's vacation would have hampered its operations. Two company witnesses expressed such an opinion without any further evidence or factual support. We think the District Court erroneously drew an inference of undue hardship from such testimony. The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations. Balanced against the interests to be protected by §2000e, we cannot say such an accommodation would result in an undue hardship to the employer.[8]

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from

8. Cases cited by TWA are readily distinguishable. They deal with situations where the work force available to accommodate the complaining employee's needs was small, *see, e.g., Johnson* v. *United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974); or where the employer presented no evidence to support its claim that it reasonably accommodated its employee's needs, *see, e.g., Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972), or that it would suffer undue hardship, *see, e.g., Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969). Moreover, we think a totality of the circumstances approach must reject unproven assumptions that the company will be inundated with similar demands. That approach would be more persuasive at a point in time when the hardship was in fact evident and was manifestly undue. Hardison's request was the first of its kind which TWA's witnesses could recall.

the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative would be an undue hardship because such workers must be paid overtime compensation. The District Court said, "The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to s[t]ay on the job and also to observe their religion", 375 F. Supp. at 889, and that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs." 375 F. Supp. at 891. These general statements, while arguably correct, may tend to distort the actual hardship which overtime payments would have imposed upon TWA to fill Hardison's Sabbath shift under the facts of this case. The regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation. *Cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975). The regulation expressly casts upon the employer the burden of proving undue hardship upon its business. Each case must stand upon its own facts. The actual cost of accommodation by filling Hardison's Sabbath shift from available personnel is not clear from the record. We do know that in this case the cost would have ended upon Wyatt's return from his vacation.[9] The company might well have concluded that the additional expense was preferable to getting along with one less man on the shift or suffering the administrative inconvenience of seeking a swap for Hardison. It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden

9. It should also be obvious that neither Hardison nor his religion would have benefited financially from such an accommodation.

it might create upon the business of TWA. We cannot say that its burden of proof has been met in this case.

(3) A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.[10] While both TWA and the union indicated no opposition to a voluntary swap, the acquiescence was clearly couched in terms of the limitations imposed by Article VI, the seniority clause of the collective bargaining agreement:

> (b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

The company relied upon the union steward to handle the details. Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening. Thus, the company and the union contended that they could not individually or jointly act to make a job exchange which would accommodate Hardison's religious need to be free of servile work on his Sabbath.

The proper relationship between a bona fide seniority system and the requirement of reasonable accommodation

10. TWA had earlier agreed to a "swap" on Hardison's religious holidays provided Hardison was willing to work an equal number of "Christian" holidays and another employee was willing to trade with Hardison. None of the holidays (as distinguished from Sabbath days) had fallen on Hardison's shift prior to his discharge, and we are not concerned with whether TWA's posture with respect to such religious holidays was a reasonable accommodation. We note, however, that the undertaking was to permit a swap, not to find one or obtain union approval.

under 29 C.F.R. §1605.1 has not yet been settled by the Supreme Court.[11] The Equal Employment Opportunity Commission has taken the position that when the inflexibility of a collective bargaining agreement is raised as a defense to charges of religious discrimination, that inflexibility must be justified by substantial business necessity. E.E.O.C. Decision No. 73-0314 (Aug. 31, 1972), 1973 CCH EEOC Decision ¶6379; E.E.O.C. Decision No. 72-2066 (June 22 1972), 4 FEP Cases 1063, 1973 CCH EEOC Decisions ¶6367. At least one court has directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee. *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974). *But see Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.[12] We are not required to reach that point in this case, however, because the evidence is clear that TWA

11. 42 U.S.C. §2000e-2(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * *

12. If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

did not seek and the union therefore did not refuse to entertain a possible variance.[13]

TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing. The matter was not referred to the Union Relief Committee, an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations. This was the first Sabbath request which TWA and the union had received at the Kansas City operation. While company officials testified of their concern that giving Hardison a variance would irritate other union members, we find no evidence to support such an inference, nor are we convinced that such irritation, if real, would have been an undue hardship on the employer's business. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). *See generally*, Annot., 22 A.L.R. Fed. 580 (1975).

III

UNION LIABILITY

The District Court rejected the union's contention that the duty of accommodation falls only upon the employer and not upon the union. Judge Oliver observed:

13. In *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), a collective bargaining agreement which contained a seniority provision also contained a provision that "seniority cannot be the sole determining factor in making shift assignments." The court held that failure of the employer to seek a variance to permit the employee, a Seventh Day Adventist, to transfer to a position which would avoid his working on his Sabbath was a violation of Title VII. *But see Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972), decided prior to the 1972 Amendment to Title VII which makes clear that failure to make affirmative accommodation must be justified by the employer.

> The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
>
> Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished.

375 F. Supp. at 882. We agreed with Judge Oliver's analysis and conclusion that in a proper case a union may be held to a duty of reasonable accommodation as well as the employer. This conclusion is consistent with the provisions of 42 U.S.C. §2000e-2(c), which declare it to be an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Thus, the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

The District Court next considered the union's duty in light of its existing contract. Finding the seniority provisions of the contract to be facially neutral, the District Court held it to be "coincidental" that as to Hardison

"the seniority system acted to compound his problems in exercising his religion." 375 F. Supp. at 883. The District Court further found that the union's duty to accommodate in this case "did not require the union to ignore its seniority system" and that the efforts of the union in behalf of Hardison did not violate its duty of fair representation. 375 F. Supp. at 883-85.

The conclusions are not directly challenged upon appeal, the briefs and oral argument are directed to the breach of duty by TWA. We are thus not required to to reach the substantive correctness of such conclusions. *Twin City Federal Savings & Loan Association* v. *Transamerica Insurance Co.*, 491 F.2d 1122, 1127 (8th Cir. 1974); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). We reserve for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971).[14] At this point, no hard rules seem possible; the balancing of important competing interests must be done on a case by case basis.

---

14. In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971), the Fourth Circuit held:

> Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. [footnote omitted]

IV

CONSTITUTIONAL CLAIM

Since we conclude that TWA violated its duty of accommodation, we must reach its constitutional claim that Title VII violates the Establishment Clause of the First Amendment by requiring an accommodation. TWA contends that the statute is not neutral as between groups of religious believers and nonbelievers. *See School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963); *Everson* v. *Board of Education,* 330 U.S. 1 (1947). The view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is not without articulate support. *See* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, 628 (1971). *But see* Comment, *Religious Observance and Discrimination in Employment,* 22 Syracuse L. Rev. 1019 (1971).

The District Court, however, found this constitutional attack upon the statute and guidelines to be without merit. It first applied the three-fold test set forth in *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 772-73 (1973): (1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. The District Court stated:

> The duty to accommodate, as stated in 42 U.S.C. §2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposes a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.
>
> Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

375 F. Supp. at 888.

The same constitutional argument was recently raised in *Cummins* v. *Parker Seal Co., supra,* and similarly rejected. The Sixth Circuit held that both the statute and the regulation met the three-fold test of *Nyquist.* The purpose of the statute, it observed, was "to prevent discrimination in employment." *Id.* at 552. This purpose, it noted, was upheld against constitutional challenge in *Griggs* v. *Duke Power Co., supra,* which dealt with racial discrimination. It found further support in the reasoning of the Supreme Court in *Gillette* v. *United States,* 401 U.S. 437 (1971), wherein draft exemptions for conscientious objectors were upheld, not only upon pragmatic grounds but also because a valid state interest lay in the promotion

of conscientious action thought to be important in a democratic society. The Sixth Circuit noted that neither the statute nor the regulation advanced religion; no financial support was mandated for religious institutions. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). Finally, it noted that the mere requirement of reasonable accommodation involved far less government entanglement with religion than the Sunday closing laws sanctioned by *McGowan* v. *Maryland*, 366 U.S. 420 (1961). We find this reasoning persuasive, and we agree with the District Court's conclusion that the constitutional challenge must be rejected.

V

CONCLUSION

We affirm the entry of judgment in favor of defendant unions. Since we hold that TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action, we reverse the judgment in favor of TWA and remand the case to the District Court for a determination of appropriate relief under 42 U.S.C. §§2000e-5(g) and 2000e-5(k).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.